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No. 10501

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHARLES GROMER DICKINSON and DORIS
MAY DICKINSON, His Wife; WILLIAM
KEMP; and L. K. FEREVA, Individually
and doing business under the firm name and
style of "FEREVA CHEVROLET COM-
PANY",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD.,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,

Northern Division -

FILED

NOV 22 1943

PAUL P. O'BRIEN,

No. 10501

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Circuit Court of Appeals

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CHARLES GROMER DICKINSON and DORIS
MAY DICKINSON, His Wife; WILLIAM
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

Attorneys for Appellants:

J. OSCAR GOLDSTEIN, ESQ.
BURTON J. GOLDSTEIN, ESQ.

Chico, Calif.

MILTON M. HOGLE, ESQ.

Willows, Calif.

ERLING S. NORBY, ESQ.

Marysville, Calif.

Attorneys for Appellee:

MYRICK & DEERING AND SCOTT,
JAMES WALTER SCOTT, ESQ.

Standard Oil Bldg.,
San Francisco, Calif.

In the District Court of the United States, In and
For the Northern District of California, Northern
Division.

Equity No. 4287

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., A Corporation,

Plaintiff,

vs.

CHARLES GROMER DICKINSON, DORIS MAY DICKINSON, WILLIAM KEMP, and L. K. FERREVA, individually and doing business under the firm name and style of FERREVA CHEVROLET COMPANY,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF, ETC.

Plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., brings this suit under and pursuant to the Federal Declaratory Judgment Act, (Judicial Code Section 274-D, 28 U.S.C.A. Section 400) and alleges:

1.

That plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of Scotland, and at all times herein mentioned said

corporation [1*] was and is now engaged in the business of insurance against loss or damage arising out of liability; that said corporation is and was at all the times herein mentioned duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

2.

That defendants Charles Gromer Dickinson and Doris May Dickinson are citizens of the State of California, and reside in the City of Chico, County of Butte, in said State;

That defendant William Kemp is a citizen of the State of California, and resides in the Town of Yuba City, County of Sutter, said State;

That defendant L. K. Fereva is a citizen of the State of California, and resides in the City of Lincoln, County of Placer, said State.

3.

That the amount in controversy exclusive of interest and costs exceeds the sum of \$3,000.00.

4.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code Section 274-D, 28 U.S.C.A. Section 400.)

*Page numbering appearing at foot of page of original certified Transcript of Record.

5.

That on or about the 6th day of December, 1939, plaintiff issued a policy of automobile insurance to defendant L. K. Fereva; that the policy period was from December 16, 1939, to December 16, 1940, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant L. K. Fereva individually and doing business under the firm name and style of [2] Fereva Chevrolet Company, to pay on behalf of said defendant L. K. Fereva, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums not exceeding \$7,500.00 for each person, and not exceeding \$30,000 for each accident, which said defendant L. K. Fereva should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury sustained by any person or persons, caused by accident, and arising out of the ownership, maintenance and use of a certain automobile covered by said policy of automobile insurance, to-wit, a Cadillac Tow Car, Year 1924; that a true copy of said policy is attached hereto and marked Exhibit "A"; that reference is hereby expressly made to said exhibit and the same is hereby made a part hereof.

6.

That on the 25th day of February, 1940, at the hour of approximately 6:15 o'clock A.M. of said day, an accident occurred on U.S. Highway num-

ber 99-E, between the cities of Roseville and Lincoln, Placer County, California, at a point approximately two miles south of the City of Lincoln; that at that time and place defendant L. K. Fereva controlled and was using upon the shoulder of said U. S. Highway number 99-E the automobile tow truck covered by said policy of insurance; that in said accident defendants Charles Gromer Dickinson, Doris May Dickinson and William Kemp received and sustained certain injuries to person and property; that on or about the 26th day of April, 1940, the defendant L. K. Fereva for the first time advised this plaintiff that said accident had occurred, and that an action for damages had been commenced against him by the said Charles Gromer Dickinson and Doris May Dickinson, and that summons and complaint had been served upon him; that until so advised plaintiff had no [3] information that an accident had occurred or that any action had been commenced; that plaintiff alleges that it was released of all obligations and liability under said policy of insurance so far as said accident is concerned by reason of the failure of defendant L. K. Fereva to notify plaintiff that any such accident had occurred until sixty (60) days after said 25th day of February, 1940.

7.

That on or about the 12th day of April, 1940, defendants Doris May Dickinson and Charles Gromer Dickinson commenced an action for damages against defendant L. K. Fereva in the Superior

Court of the State of California, in and for the County of Placer, entitled "Doris May Dickinson and Charles Gromer Dickinson, husband and wife, Plaintiffs, vs. L. K. Fereva, doing business under the firm name and style of 'Fereva Chevrolet Co.', Richard Roe Company, a corporation, Henry Roe Company, a copartnership, John Doe First, John Doe Second and John Doe Third, Defendants, and numbered therein 11844; that a true copy of the complaint in said action is attached hereto and marked Exhibit "B"; that specific reference is hereby made to said Exhibit "B" and the same is hereby made a part hereof.

8.

That on or about the 30th day of November, 1940, defendant William Kemp commenced an action for damages against defendant L. K. Fereva, in the Superior Court of the State of California, in and for the County of Butte, entitled "William Kemp, Plaintiff, vs. K. L. Fereva, individually, and doing business under the firm name and style of Fereva Chevrolet Company, Charles Dickinson, First Doe, Second Doe and Third Doe, a corporation, Defendants", and numbered therein 18256; that a true copy of the complaint in said action is attached hereto and marked Exhibit "C"; that specific reference is hereby made to said Exhibit "C" and the same is hereby made a part hereof.

9.

That said action so brought in the County of Placer by said Doris May Dickinson and Charles Gromer Dickinson came on regularly for trial before the court sitting with a jury; that thereafter and on or about the 6th day of December, 1940, judgment was duly given, made and entered on the verdict of said jury in favor of said Doris May Dickinson and Charles Gromer Dickinson, the plaintiffs therein, and against said L. K. Fereva doing business under the firm name and style of Fereva Chevrolet Co., defendant, in the sum of \$5,000.00, and costs of suit.

10.

That the said action brought in the County of Butte by said defendant William Kemp, plaintiff therein, against said defendant L. K. Fereva, in which said William Kemp seeks damages in the sum of \$7,905.00, and his costs of suit, is still pending therein, and has not yet been brought to trial.

11.

That an actual controversy exists as between plaintiff and the defendants herein, as follows: Defendants Doris May Dickinson and Charles Gromer Dickinson contend that since the automobile referred to in the complaint in said action numbered 11844 is an automobile covered by the said insurance policy, plaintiff herein has an obligation under said policy, it having been adjudged in said action that said Doris May Dickinson and Charles

Gromer Dickinson have judgment against said defendant L. K. Fereva for the sum of \$5,000.00 and costs, to pay the said judgment to the said defendants Doris May Dickinson and Charles Gromer Dickinson;

That defendant William Kemp contends that since the automobile referred to in his said complaint in said action numbered 18256 is covered by said insurance policy plaintiff herein is obliged under [5] said policy to pay to said defendant William Kemp such sum or sums as he may recover as damages in said action against said defendant L. K. Fereva up to the aggregate amount of \$7,500.00;

Defendant L. K. Fereva contends that since said automobile referred to in the complaints in both of said actions is an automobile covered by the terms of said insurance policy, this plaintiff has the obligation under said policy to defend said L. K. Fereva in said actions, and further contends that plaintiff is under obligation to pay, and is liable to pay, any sums recovered, or to be recovered, as damages by said Doris May Dickinson, Charles Gromer Dickinson and William Kemp by reason of the alleged accident set forth in the complaints in said two actions, and that plaintiff herein has the obligation under said policy to pay said sums to said Doris May Dickinson, Charles Gromer Dickinson and William Kemp, up to the aggregate amount recovered, not to exceed \$7,500.00 to each of said three individuals.

On the other hand plaintiff herein denies and controverts said contentions, and each of them, and on its part contends that although the automobile referred to in the said two complaints was covered by said policy of insurance plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned, and contends that it was released of all obligations and liability under said policy by reason of the failure of said defendant L. K. Fereva to notify plaintiff that any such accident occurred until sixty (60) days after it is alleged in the said complaints that the same did occur.

12.

That defendant L. K. Fereva has requested plaintiff herein to defend in his name and on his behalf said action brought by Doris May Dickinson and Charles Gromer Dickinson, and the said action brought by William [6] Kemp; that plaintiff herein has defended the first of said actions, subject, however, to an express and complete reservation of all rights of plaintiff, and that plaintiff has consented to defend said action brought by William Kemp, subject, however, to an express and complete reservation of all rights of plaintiff, and has so defended said action hitherto, and is now withdrawing from the defense of said action; that said action is now at issue.

13.

That the continued defense of said action brought by William Kemp in said Superior Court, by plain-

tiff herein will result in loss and damage to plaintiff by reason of the expense that thereby will be incurred by plaintiff; that a declaratory judgment or decree herein determining the rights and other legal relations of the parties hereto is necessary to enable plaintiff herein properly to reach its decision respecting its continued defense of said action in said Superior Court, and to protect plaintiff should it decide not to continue further with said defense, and to avoid the damages and loss that will result to plaintiff by reason of the accrual of expenses incident to the continuation of said defense; that the entry of a declaratory judgment or decree herein is necessary to avoid the loss and damages that will accrue to plaintiff in the event said action in said Superior Court should proceed to decision, and judgment should be entered therein for said William Kemp, since, in such event, unless a declaratory judgment or decree has been entered herein determining plaintiff herein has no liability under any judgment in said action in said Superior Court, plaintiff will be obliged to defend against the claims of defendants Doris May Dickinson, Charles Gromer Dickinson and William Kemp herein that plaintiff is liable to pay said judgments in said Superior Court actions up to the aggregate of \$7,500.00 and costs each. [7]

14.

That plaintiff is informed and believes, and upon such information and belief alleges that unless Doris May Dickinson and Charles Gromer Dick-

inson are enjoined they will undertake to impose upon plaintiff herein liability for the payment of the judgment heretofore rendered in their favor against defendant L. K. Fereva; that unless a preliminary injunction is granted herein restraining the defendants herein, and each of them, and their respective attorneys, until this court enters its final judgment or decree herein, from taking any further proceedings in the said Superior Court actions, and from taking any proceeding for the purpose of imposing any liability upon plaintiff herein based upon the judgment heretofore rendered in favor of Doris May Dickinson and Charles Gromer Dickinson in said Superior Court action in the County of Placer, or based upon any judgment that may be rendered for said William Kemp in said Superior Court action in the County of Butte, plaintiff herein will suffer irreparable loss and damage in that plaintiff herein will be obliged to employ counsel to defend against said claims that plaintiff herein is liable to pay said judgments not to exceed the aggregate amount of \$7,500.00 in favor of each of the individual defendants, and plaintiff herein will have no right to recover the expenses that will be so incurred, or any part thereof; that the granting of such preliminary injunction is necessary to avoid multiplicity of judicial proceedings in that any proceedings to impose liability upon plaintiff herein, based upon any judgment for said Doris May Dickinson and Charles Gromer Dickinson and William Kemp, or either or any of them, will present the same issues and

questions as those presented by this suit for a declaratory judgment or decree; that if such injunction is not granted, and the claims of said defendants herein that plaintiff herein is liable to pay any of such judgments are adjudicated in favor of said claims, [8] any judgment or decree that may be rendered herein for plaintiff herein will be ineffectual.

Wherefore, plaintiff prays:

(a) That defendants, and each of them, be required to answer this bill of complaint in the nature of a petition for declaratory judgment;

(b) That this Court adjudge, decree and declare the rights and legal relations of the parties under and by reason of that certain policy of automobile insurance hereinabove referred to in order that such declaration have the force and effect of a final judgment and decree;

(c) That this Court adjudge and decree that plaintiff herein has no obligation under said policy of automobile insurance to defend said L. K. Fereva in the said actions hereinabove referred to, brought in the Superior Court of the County of Placer, and in the Superior Court of the County of Butte;

(d) That this Court adjudge and decree that plaintiff herein has no liability under said policy of automobile insurance by reason of the alleged accident set forth in the complaint in the said two actions brought in the said Superior Courts of the State of California because of the failure of the

defendant L. K. Fereva to give plaintiff herein any notice of said alleged accident until sixty (60) days after said accident is alleged to have occurred.

(e) That this Court grant a preliminary injunction restraining defendants herein, and each of them, and their respective attorneys, until this Court enters its final judgment or decree herein from taking any further proceedings in said actions in said Superior Courts in and for the County of Butte, and in and for the County of Placer, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that [9] may be rendered in favor of Doris May Dickinson, Charles Gromer Dickinson and William Kemp, or either or any of them in the said two Superior Court actions.

(f) For such other and further relief as to the Court may seem meet in the premises.

MYRICK & DEERING AND
SCOTT

JAMES WALTER SCOTT

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 7, 1941. [10]

[Printer's Note: Copy of policy attached to complaint is set out in full as Plaintiff's Exhibit No. 1, at page 119 of this printed record.] [11]

[Title of District Court and Cause.]

ANSWER AND CROSS-CLAIM

ANSWER OF CHARLES GROMER DICKINSON, DORIS MAY DICKINSON, AND WILLIAM KEMP

Come now defendants Charles Gromer Dickinson, Doris May Dickinson, and William Kemp, and for answer to the complaint of plaintiff on file herein, admit, Deny, and allege as follows:

I.

Answering the allegations of paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11, said answering defendants admit the allegations of said paragraphs.

II.

Answering the allegations of paragraph 6 of plaintiff's [24] complaint, defendants admit the allegations of said paragraph from the beginning thereof to and including the words "person and property", in line 24, on page 3 of plaintiff's complaint; answering the remaining allegations of said paragraph 6, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and basing their denial upon that ground, Deny, generally and specifically, each, every, and all of the said remaining allegations of said paragraph; and in particular, defendants specifically Deny that said L. K. Fereva on the 26th day of April, 1940, first advised plaintiff of said accident and Deny, that

prior to said date, plaintiff had no information that an accident had occurred and/or any action against said L. K. Fereva had been commenced; and further, specifically Deny that plaintiff was released of all obligations and liability, or any obligations and/or liability, or at all, under said policy of insurance so far as said accident is concerned, by reason of any failure of said L. K. Fereva to notify plaintiff that such accident had occurred.

Upon information and belief, defendants allege that said plaintiff was notified of said accident within 15 days time thereafter by said L. K. Fereva and was further notified within said 15 days time of the imminence of defendants' suit for damages as a result thereof.

III.

Answering the allegations of paragraph 12 of plaintiff's complaint, defendants admit the allegations of said paragraph from the beginning thereof to the words "said actions", in line 1, on page 7 of plaintiff's complaint. Answering the remaining allegations of said paragraph to the end thereof, defendants allege that they are without knowledge or information sufficient to form [25] a belief as to the truth of said allegations and basing their denial upon that ground, Deny, generally and specifically, each, every and all the remaining allegations of said paragraph, excepting, however, that defendant William Kemp admits that plaintiff has consented to defend an action brought by

him against plaintiff. In particular, defendants Charles Gromer Dickinson and Doris May Dickinson specifically Deny that said action brought by them was defended subject to an express and/or any, and/or complete reservation of plaintiff's rights, or subject to any reservation at all, and defendant William Kemp denies that plaintiff's defense of said action brought by him and/or its consent to defend said action is subject to an express and/or any, and/or complete reservation of plaintiff's rights, and/or any reservation at all.

Upon information and belief, all of said defendants allege that the respective actions filed by them against plaintiff have been and now are being defended by plaintiff without express reservation, or any reservation of any kind or character.

IV.

Answering the allegations of paragraphs 13 and 14 of plaintiff's complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and basing their denial upon that ground, Deny, generally and specifically, each, every and all of the allegations of said paragraphs, except that defendants Charles Gromer Dickinson and Doris May Dickinson admit that they are undertaking to impose liability on plaintiff for the payment of the judgment heretofore rendered in their favor in the Superior Court of the State of California, in and for the County of Placer, against said L. K. Fereva. [26]

[Title of District Court and Cause.]

CROSS-CLAIM

Come now Charles Gromer Dickinson and Doris May Dickinson, cross-claimants above named, and complaining of cross-defendant for cause of action allege:

I.

Cross-claimants refer to and incorporate paragraphs 1, 3, 5, and 7 of plaintiff's complaint and plead and allege each and every allegation of said paragraphs the same as if they had been pleaded by cross-claimants in the first instance and as if fully set forth herein in detail.

II.

That cross-claimants are residents of the County of Butte, State of California.

III.

That on or about the 7th day of December, 1940, judgment was rendered by the Superior Court of the State of California, in and for the County of Placer, in said action above referred to, and entitled, "Doris May Dickinson and Charles Gromer Dickinson, husband and wife, Plaintiffs, versus L. K. Fereva, doing business under the firm name and style of 'Fereva Chevrolet Company', Defendant", and numbered 11844 in the files of said court, by which judgment it was ordered, adjudged and decreed that the said Doris May Dickinson and Charles Gromer Dickinson, husband and wife, have [27] and recover from the defendant, L. K. Fer-

eva, doing business under the firm name and style of "Fereva Chevrolet Company", the sum of \$5000.00, and costs taxed in the sum of \$215.65, and accruing costs in the sum of \$1.00. That said judgment was rendered after trial by jury in which the jury rendered its verdict in favor of said Doris May Dickinson and Charles Gromer Dickinson, and against said L. K. Fereva, doing business under the firm name and style of "Fereva Chevrolet Company", in the said amount of \$5000.00, together with costs of suit.

IV.

Upon information and belief, cross-claimants allege that the said insured, L. K. Fereva, doing business under the firm name and style of "Fereva Chevrolet Company", promptly notified the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, cross-defendant herein, of the claim of Doris May Dickinson and Charles Gromer Dickinson, cross-claimants herein, arising out of said collision and that in accordance with the terms of the policy, the said cross-defendant, General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, in fact defended the said action during its entire course of litigation; that further, L. K. Fereva is not in default in any of the terms and conditions of said policy of insurance by him to be performed.

V.

That said judgment entered on the 7th day of December, 1940, as aforesaid, is now a final judg-

ment and that no bond or undertaking has been posted for the payment thereof in proceedings on appeal, or otherwise.

VI.

That there is now due, owing and unpaid under and by [28] virtue of the said judgment, a total sum of \$5,216.65, with interest thereon at the rate of seven (7) per cent per annum, from the 7th day of December, 1940, no part of which has been paid.

VII.

That prior to the filing of the within action said Doris May Dickinson and Charles Gromer Dickinson, husband and wife, made due demand upon the cross-defendant for the payment of the whole of said judgment, with interest and costs thereon; that said cross-defendant, however, failed and refused to pay any part or portion thereof to said cross-claimants, and there is now wholly due, owing and unpaid under and by virtue of the terms of the said policy of indemnity insurance, to cross-claimants herein, the sum of \$5,216.65, together with interest thereon at the rate of seven per cent per annum, from December 7th, 1940, no part of which has been paid.

Wherefore, by reason of the foregoing, defendants Charles Gromer Dickinson, Doris May Dickinson, and William Kemp, and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, pray for judgment against plaintiff and cross-defendant as follows:

1. That this Court adjudge and decree that plaintiff herein was obligated to and did defend the said action hereinabove referred to, brought by Charles Gromer Dickinson and Doris May Dickinson, in the Superior Court of the County of Placer, against said L. K. Fereva, and that said defense was without reservation.

2. That this Court adjudge and decree that plaintiff herein is obligated to defend the said action filed by William Kemp against L. K. Fereva, hereinabove referred to, brought in the Superior Court of the County of Butte, and that said defense be without reservation.

3. That this Court adjudge and decree that plaintiff received the notice of said collision required under the policy [29] of automobile insurance, hereinabove referred to, and that plaintiff is liable under said policy of automobile insurance for any sum or sums of money for which judgment may be given in any action or actions now on file, or which may hereafter be filed, arising out of said collision, within the limits set forth in said policy of automobile insurance.

4. In favor of defendants and cross-claimants, Charles Gromer Dickinson and Doris May Dickinson, and against plaintiff and cross-defendant, in the sum of \$5,216.65, together with interest thereon at the rate of seven per cent per annum from December 7, 1940.

5. For their costs of suit herein.

6. For such other and further relief as to this Court may seem meet and proper, in the premises.

Dated: February 26, 1941.

J. OSCAR GOLDSTEIN

Attorney for defendants and
cross-claimants, Charles
Gromer Dickinson and
Doris May Dickinson.

ERLING S. NORBY

Attorney for defendant, Wil-
liam Kemp. [30]

State of California

County of Butte—ss.

Charles Gromer Dickinson, being first duly sworn,
deposes and says:

I am one of the defendants and cross-claimants
in the above-entitled action, and have read the fore-
going Answer and Cross-Claim and know the con-
tents thereof, and that same is true of my own
knowledge, except as to those matters which are
therein stated on information and belief, and as to
those matters I believe it to be true.

CHARLES GROMER DICKIN-
SON

Affiant.

Subscribed and sworn to before me this 26th day
of February, 1941.

(Seal)

J. OSCAR GOLDSTEIN

Notary Public in and for the
County of Butte, State of
California.

[Endorsed]: Filed Feb. 27, 1941. [31]

[Title of District Court and Cause.]

ANSWER OF L. K. FEREEVA

Comes Now, the above-named defendant, L. K. Fereva, individually and doing business under the firm name and style of Fereva Chevrolet Company, and answering the complaint on file herein, Admits, Denies and Alleges, as follows:

I.

Answering the allegations of Paragraphs I, II, III, IV, V, VII, VIII, IX, X and XI, said answering defendant Admits the allegations of said paragraphs.

II.

Answering the allegations of Paragraph VI of plaintiff's complaint, this answering defendant Admits the allegations of said paragraph from the beginning thereof, to and including the words "person and property", in line 24, on page 3 of plaintiff's complaint; [32]

Denies each and every, all and singular, generally and specially, conjunctively and disjunctively, the remaining allegations of Paragraph VI, and in particular this answering defendant Denies that plaintiff was for the first time advised of said accident or that an action for damages has been commenced against the defendant L. K. Fereva by Charles Gromer Dickinson and Doris May Dickinson, and that summons and complaint had been served upon him, on or about the 26th day of April, 1940, and in this connection this answering defendant alleges that

within fifteen days from the date of said accident, to wit, on the 25th day of February, 1940, this answering defendant notified plaintiff of said accident.

III.

Answering Paragraph XII of plaintiff's complaint, this answering defendant Admits the allegations of said paragraph, save and except that defendant Denies that plaintiff herein defended the action brought by Doris May Dickinson and Charles Gromer Dickinson, subject to an express and/or complete reservation, or any reservation of all and/or any rights of plaintiff.

IV.

Answering the allegations of Paragraphs XIII and IV of plaintiff's complaint, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of said allegations, and basing his denial upon that ground Denies generally and specifically, each, every and all of the allegations of said paragraphs, save and except that this answering defendant is informed and believes and upon such information and belief alleges that the defendants, Charles Gromer Dickinson and Doris May Dickinson, are undertaking to impose liability on plaintiff for the payment of the judgment heretofore rendered in their favor in the Superior Court of the State of California, in and for the County of Placer, against said L. K. Fereva.

Wherefore, by reason of the foregoing, defendant L. K. Fereva prays for judgment against plaintiff as follows:

1. That this Court adjudge and decree that plaintiff herein was obligated to and did defend the said action hereinabove referred to, brought by Charles Gromer Dickinson and Doris May Dickinson, in the Superior Court of the County of [33] Placer, against said L. K. Fereva, and that said defense was without reservation.

2. That this Court adjudge and decree that plaintiff herein is obligated to defend the said action filed by William Kemp against said L. K. Fereva, hereinabove referred to, brought in the Superior Court of the County of Butte, and that said defense be without reservation.

3. That this Court adjudge and decree that plaintiff received the notice of said collision required under the policy of automobile insurance, hereinabove referred to, and that plaintiff is liable under said policy of automobile insurance for any sum or sums of money for which judgment may be given in any action or actions now on file, or which may hereafter be filed, arising out of said collision, within the limits set forth in said policy of automobile insurance.

4. For his costs of suit herein.

5. For such other and further relief as to this Court may seem meet and proper, in the premises.

Dated: March 1st, 1941.

GEIS & HOGLE

Attorneys for Defendant,

L. K. Fereva. [34]

State of California

County of Glenn—ss.

Milton M. Hogle, being duly sworn on behalf of the defendant L. K. Fereva in the above-entitled action, says: That he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that the said defendant is absent from the County of Glenn, where his attorneys have their office, and that the affiant is one of defendant's attorneys, and therefore makes this affidavit.

MILTON M. HOGLE

Subscribed and sworn to before me this 1st day of March, 1941

(Seal)

CARROLL F. BYRD

Notary Public in and for the County of Glenn, State of California.

[Endorsed]: Filed Mar. 3, 1941. [35]

[Title of District Court and Cause.]

ANSWER TO CROSS-CLAIM

Comes now General Accident Fire and Life Assurance Corporation, Ltd. and answers the cross-claim of Charles Gromer Dickinson and Doris May Dickinson herein as follows:—

1.

Denies each and every, all and singular, the allegations contained in paragraph IV thereof, save that this cross-defendant did defend the said action under a reservation of rights.

2.

Answering paragraph VII denies each and every, all and singular, the following allegations therein contained:

“* * * * * and there is now wholly due, owing and unpaid under and by virtue of the terms of said policy of indemnity insurance, to cross-claimants herein, the sum of \$5,216.65, together with interest thereon at the rate of seven per cent per annum, from December 7th, 1940, no part of which has been paid” [36]

3.

Further answering this cross-defendant alleges that it has not information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraph VI of said cross-claim, and placing its denials and each and every thereof upon said ground, cross-defendant denies each and every, all and singular, the allegations contained in said paragraph VI.

Wherefore, this cross-defendant prays that said cross-claimants take nothing by their cross-claim herein.

MYRICK & DEERING AND
SCOTT

JAMES WALTER SCOTT

Attorneys for Cross-Defend-
ant. [37]

State of California

City and County of San Francisco—ss.

W. B. Wentz being first duly sworn, deposes and says:—

That he is one of the General Agents of the General Accident Fire and Life Assurance Corporation, Ltd., a corporation, the cross-defendant named in the above entitled action, and as such is authorized to verify the foregoing Answer To Cross-Claim; that he has read the said Answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and that as to such matters he believes it to be true.

W. B. WENTZ

Subscribed and sworn to before me this 7th day of March, 1941.

(Seal)

AGNES M. COLE

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires October 18, 1942

[Endorsed]: Filed Mar. 8, 1941. [38]

In the District Court of the United States, Northern
District of California, Northern Division.

Equity No. 4287-L

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., a cor-
poration,

Plaintiff,

vs.

CHARLES GROMER DICKINSON et al.

Defendants.

CHARLES GROMER DICKINSON, and DORIS
MAY DICKINSON, husband and wife,

Cross-Claimants,

vs.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., OF
PERTH, SCOTLAND, a Corporation,

Cross-Defendant.

AMENDMENT TO ANSWER OF DEFEND-
ANTS CHARLES GROMER DICKINSON,
DORIS MAY DICKINSON AND WILLIAM
KEMP

Come now the defendants above named, Charles
Gromer Dickinson, Doris May Dickinson and Wil-
liam Kemp, and by leave of court first had and
obtained, file this their amendment to [39] their
answer in the above entitled court and cause.

Said defendants add the following to their answer heretofore filed in the above entitled court and cause and to follow paragraph IV of their answer on page 3 as heretofore filed:

As and for an Affirmative, Separate and Distinct Defense to Plaintiff's Cause of Action, Said Defendants Allege as Follows:

I.

Upon information and belief said defendants allege:

That at all the times mentioned in the complaint of plaintiff and on the 25th day of February, 1940, and for many years prior thereto, the defendant L. K. Fereva was a general insurance agent for the plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, and that particularly on the first day of July, 1937, said plaintiff filed with the Insurance Commissioner of the State of California a notice of the appointment of said L. K. Fereva to act as its agent within the State of California until his license shall be denied, revoked or suspended, and that on said appointment there was issued by the Insurance Commissioner of the State of California to said L. K. Fereva an insurance agent's license, which authorized said L. K. Fereva to act as an insurance agent for plaintiff in the County of Placer and to solicit, negotiate or effect contracts of insurance (except life and inter-insurance) on behalf of plaintiff; that particularly for the fiscal year commencing July 1, 1939 and ending July 1, 1940, said L. K. Fereva was granted

license No. 10513 by the Insurance Commissioner of the State of California; that on said appointment said L. K. Fereva yearly, commencing July 1, 1937 up to and including July 1, 1940 and ending with the fiscal year 1941, received his license from said insurance commissioner and acted as one of the general agents for said company in said County of Placer; [40] that during all of said period of time and for about five years prior to said July 1, 1937, said defendant L. K. Fereva solicited, negotiated and effected, issued and caused to be issued as a general agent for said plaintiff numerous policies or contracts of insurance, acting in concert with and by and through Wentz & Erlin, the attorneys in fact for said plaintiff corporation in the State of California, who at all times herein mentioned have their principal place of business at 206 Sansome, San Francisco, California, and that said policies of insurance thus contracted for and effected in behalf of plaintiff corporation by said L. K. Fereva included fire and theft, public liability, collision, property damages, comprehensive insurance and other kindred policies; that during the period of time herein mentioned said L. K. Fereva contracted for and effected in behalf of plaintiff corporation hundreds of policies of insurance of all types with said plaintiff corporation, by and through Wentz & Erlin, its attorneys in fact, and from time to time was paid and received the regular stipulated commissions for the obtaining of said business and acting as a general agent for said plaintiff corporation

in the County of Placer in connection with said policies and contracts of insurance.

II.

That specifically from and after the said first day of July, 1937, said defendant L. K. Fereva was called upon to and did, in connection with his duties as agent for said plaintiff, report to said plaintiff company any and all accidents or loss or liability arising under any such policies issued by said plaintiff to him, or through him, as its agent and representative thereof by giving oral notice to said Wentz & Erlin at its agency office in Sacramento or San Francisco; that it was not the practice or custom of said defendant L. K. Fereva, nor of said company, as far as said L. K. Fereva [41] was concerned, to have said L. K. Fereva send in any written notices as agent for said company, but that all such notices of any liability or loss or any claim arising under any of the policies or contracts of indemnity insurance, collision insurance, public liability insurance, fire or theft or otherwise were all made by oral notices given by said L. K. Fereva to said Wentz & Erlin, and thereafter the same was always duly acted upon by said Plaintiff corporation by and through their said attorneys in fact, Wentz & Erlin, who directly represented said plaintiff under a power of attorney in the State of California; that on numerous occasions up to and including the first day of July, 1941, that was the accepted, customary and followed practice, mode and system of giving notice of any accident or loss to said plaintiff

corporation by said L. K. Fereva of any accident or any loss sustained by said L. K. Fereva, or others reporting to him, as agent for said plaintiff corporation, under any policy of insurance issued by the plaintiff corporation to said L. K. Fereva individually or through him to third persons as plaintiff's agent and representative.

III.

That for many years prior to the 25th day of April, 1940, in the event of any report of an accident or claim for loss or indemnity on any of the contracts of insurance issued by plaintiff to, or through, said defendant L. K. Fereva as its agent, said defendant L. K. Fereva orally notified said plaintiff corporation by notice given to one R. F. Urquhart, District Representative of the plaintiff corporation, and who was employed as such and directly represented Wentz & Erlin, and who maintained his headquarters in the branch office of said Wentz & Erlin in the City of Sacramento, State of California; that on such occasions, in the event of any accident or loss arising under any policy of insurance issued to, or written by, or through, [42] said L. K. Fereva, said L. K. Fereva gave oral notice to said R. F. Urquhart of the happening of such accident or loss arising, and thereupon the same was duly recognized by plaintiff as a sufficient notice and compliance with the terms of the policies of insurance requiring written notice to be given, and that the same became and was the accepted mode, system and custom of giving notice of claims

or of accidents, or of any loss as between said plaintiff corporation and said defendant L. K. Fereva on any policies of insurance issued to, or written by or through him; that for the period of time herein mentioned said plaintiff corporation allowed and permitted said R. F. Urquhart to hold himself out to said defendant L. K. Fereva as the person to whom such oral notice of any accident or loss on any policies of insurance issued to said L. K. Fereva, or others by and through him, was to be given and that for a period of about ten years prior to the 15th day of March, 1940, that condition continued and was consistently followed by said defendant L. K. Fereva in the place and stead of any written notice, and particularly in the cases of indemnity insurance policies as to public liability, property damage or collision insurance, that was the manner and form in which said defendant L. K. Fereva gave notice under condition 7 of said policy of any accident or loss arising thereunder and, accordingly, these defendants allege that said plaintiff corporation is now estopped to deny said authority of said R. F. Urquhart to receive such notice of any loss from L. K. Fereva orally and from asserting or claiming as a defense as against said defendant L. K. Fereva or these defendants that notice of loss in connection with the accident referred to in plaintiff's complaint was not given in writing.

IV.

That on the 16th day of December, 1939, the policy of [43] insurance set out in the complaint of

plaintiff became effective as to said defendant L. K. Fereva, doing business as Fereva Chevrolet Company, and was in full force and effect until December 16, 1940; that the accident referred to in plaintiff's complaint in which defendants herein were injured occurred on February 25, 1940; that thereafter and within a period of about fifteen days, said defendant L. K. Fereva, following the accepted and usual mode, custom and procedure of notice to be given to plaintiff corporation, orally notified said R. F. Urquhart of the happening of said accident referred to in plaintiff's complaint, and did not render any written notice, or file any written notice with plaintiff corporation by reason of his reliance on the previous practice, mode, conduct, attitude and relationship existing between said plaintiff and himself in reference to insurance policies issued by plaintiff to, or through, the agency of said L. K. Fereva, and which in case of accident or loss were reported to the plaintiff corporation orally by and through said R. F. Urquhart, District Representative of said Wentz & Erlin, attorneys in fact of said plaintiff corporation as above fully set forth.

V.

Defendants further allege that at the time of said accident, to wit, on the 25th day of February, 1940, said L. K. Fereva was the general agent of plaintiff in connection with the contract of liability insurance issued by it, effective as of December 16, 1939, and that in all respects all of his actions and conduct subsequent to said accident, including the oral

notice given by him to said R. F. Urquhart and Wentz & Erlin, were so done by him pursuant to his status as a general agent for said company and in line with his general authority and accepted practice, mode and custom in connection with notice of any accident or loss to be given said plaintiff [44] company in the event of accident or loss under any policies of insurance issued by plaintiff to or written by said L. K. Fereva, as its agent, servant and employee.

VI.

That said defendant L. K. Fereva,, by reason of the facts and circumstances hereinabove set forth, fully complied with the requirements set up and considered the general practice, mode and custom of the plaintiff corporation in giving notice of any accident or injury, and within fifteen days after the 25th day of February, 1940, gave such notice orally to said R. F. Urquhart, District Representative of plaintiff corporation, who was apprised of the happening of said accident and who was under a duty and obligation forthwith to act thereon as he had done in similar instances for many years prior thereto in behalf of said plaintiff corporation.

VII.

That by reason of all of the foregoing facts and circumstances herein alleged, said plaintiff waived the provision contained in paragraph 7 of the insurance contract in question requiring that written notice be given by or on behalf of the insured to the corporation or any of its authorized agents as soon

as practicable, and that as far as these defendants are concerned all of the provisions of said paragraph 7 of the policy of insurance were duly waived by said plaintiff corporation, and moreover by reason of the facts and circumstances herein set forth, so far as these defendants are concerned, said plaintiff corporation is estopped from claiming any benefit by or through the provisions pertaining to written notice of accident required to be given and as referred to in condition 7 of said contract of indemnity insurance and estopped from setting the same up as a defense to the rights of these defendants herein, if any they have, under the terms of said [45] contract of indemnity insurance referred to in plaintiff's complaint and marked Exhibit "A".

Wherefore, said defendants pray that said complaint of plaintiff be dismissed and that it take nothing by its said complaint and that the preliminary injunction heretofore granted by the above entitled court be dissolved and that these answering defendants recover their costs of suit herein.

Dated: December 22, 1941.

J. OSCAR GOLDSTEIN

BURTON J. GOLDSTEIN

Attorneys for defendants

Charles Gromer Dickinson
and Doris May Dickinson.

ERLING S. NORBY

Attorney for defendant

William Kemp. [46]

State of California,
County of Sacramento.—ss.

Charles Gromer Dickinson, being first duly sworn,
deposes and says:

I am one of the defendants in the above-entitled action and have read the foregoing Amendment to Answer of Defendants Charles Gromer Dickinson, Doris May Dickinson and William Kemp, and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

CHARLES GROMER DICKIN-
SON

Subscribed and sworn to before me this 22nd day
of December, 1941.

(Seal) ADELIA C. McCABE
Notary Public in and for the County of Sacramento,
State of California.

[Endorsed]: Filed Dec. 22, 1941. [47]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday the 29th day of December, in the year of our Lord one thousand nine hundred and 41.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

ORDER TO PREPARE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was thereupon resumed. The plaintiff rested. Thereupon the evidence was closed. Mr. Goldstein made a motion to set aside the order of submission and to reopen the case for further testimony, and after hearing the attorneys, it is Ordered that the motion be and the same is hereby denied. After argument by the Attorneys, and the instructions of the Court to the Jury, the Jury retired at 2:50 o'clock p.m. to deliberate upon its verdict. At 4:14 o'clock p.m. the Jury returned into Court and thereupon returned the following verdicts, which were Ordered recorded, viz:

"We the Jury in the above entitled action, find in favor of the defendants William Kemp and L. K. Fereva, individually, and doing business under the firm name and style of 'Fereva Chevrolet Company'.

HARRY A. ARMSTRONG,
Foreman."

"We, the Jury in the above entitled action, find in favor of defendants Charles Gromer Dickinson and Doris May Dickinson, and against the plaintiff General Accident Fire and

Life Assurance Corporation, Ltd., a corporation, and on the Cross-Complaint of said Defendants and Cross-Claimants Charles Gromer Dickinson and Doris May Dickinson, as husband and wife, we find in their favor and against the Plaintiff and Cross-Defendant General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, a corporation, in the sum of Five Thousand Two Hundred and Sixty-one Dollars and Sixty Five Cents (\$5,261.65), with interest thereon at the rate of Seven Per Cent (7%) per annum from December 7, 1940, until paid.

Dated: December 29, 1941.

HARRY A. ARMSTRONG,
Foreman," [53]

and the jurors upon being asked if said verdicts, as recorded was the verdict of the Jury, each replied that it was. Ordered that the Jury be excused from the further consideration hereof, and that they be excused until January 6, 1942. On motion of Mr. Goldstein, and with the consent of Mr. Scott, it is Ordered that findings of fact and conclusions of law and judgment be prepared by Mr. Goldstein, copies of said documents to be served upon Mr. Scott, and the originals lodged with the Clerk of the Court. Mr. Scott to thereupon have 5 days thereafter to file any proposed amendments to the proposed findings and judgment, the same to thereafter be settled by the Court. Mr. Scott then made a motion for a stay of execution until 10 days after determination of the motion for a new trial. [54]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday the 24th day of September, in the year of our Lord one thousand nine hundred and 42.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

ORDER ENTERING JUDGMENT IN FAVOR
OF PLAINTIFF AND CROSS-DEFENDANT

This case having been heretofore tried before a jury, and the jury having returned a verdict herein, said verdict being purely advisory, and the Court being of the opinion that the verdict should not be adopted as the judgment of this Court, and findings of fact and conclusions of law having been duly submitted, signed and filed, it is Ordered that judgment be entered herein in favor of the plaintiff and cross-defendant, and against the defendants and cross-complainants as prayed for in the Complaint.

[55]

[Title of District Court and Cause.]

VERDICT OF JURY

We, the Jury in the above entitled action, find in favor of defendants Charles Gromer Dickinson and Doris May Dickinson, and against the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, and on the Cross-Complaint of said Defendants and Cross-Claimants Charles Gromer Dickinson and Doris May Dickinson, as husband and wife, we find in their favor and against the Plaintiff and Cross-Defendant General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, A Corporation, in the sum of Five Thousand Two Hundred and Sixty-One Dollars and Sixty-Five Cents (\$5,261.65), with interest thereon at the rate of Seven Per Cent (7%) per annum from December 7, 1940 until paid.

Dated: December 29th, 1941.

HARRY A. ARMSTRONG,
Foreman.

[Endorsed]: Filed Dec. 29, 1941. [56]

In the Northern Division of the United States District Court for the Northern District of California

No. 4287-L

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation,

Plaintiff,

vs.

CHARLES GROMER DICKINSON, DORIS MAY DICKINSON, WILLIAM KEMP, and L. K. FERREVA, individually, and doing business under the firm name and style of "FERREVA CHEVROLET COMPANY",

Defendants.

VERDICT OF JURY

We, the Jury in the above entitled action, find in favor of the defendants William Kemp and L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company".

Dated: December 29th, 1941.

HARRY A. ARMSTRONG,
Foreman.

[Endorsed]: Filed Dec. 29, 1941. [57]

In the Northern Division of the United States District Court for the Northern District of California

No. 4287-L

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation,

Plaintiff,

vs.

CHARLES GROMER DICKINSON, et al.,
Defendants.

CHARLES GROMER DICKINSON AND DORIS MAY DICKINSON, husband and wife,
Cross-claimants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND, a corporation,
Cross-Defendant.

NOTICE OF FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

To: Myrich & Deering and Scott, by James Walter Scott, Esq., Attorneys for plaintiff and Cross-Defendant above named.

You and each of you will please take notice, and notice is hereby served upon you, that there has this day been filed with the Clerk of the court

above named, the Findings of Fact and conclusions of Law and Judgment in the above entitled action for signing by Honorable Martin I. Welsh, Judge of the United States District Court, before whom the above entitled action was tried with a jury. [58]

Copies of said Findings of Fact and Conclusions of Law and Judgment are herewith served upon you with this notice.

Dated: January 7, 1942.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
EMMETT J. SEAWELL,

Attorneys for Defendants and
Cross - Claimants, Charles
Gromer Dickinson, and
Doris May Dickinson, hus-
band and wife.

GEIS & HOGLE,

Attorneys for Defendant L.
K. Fereva.

ERLING S. NORBY,

Attorney for Defendant Wil-
liam Kemp.

[Endorsed]: Filed Jan. 8, 1942. [59]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Be It Remembered that the above entitled action came on regularly for trial before the Honorable Martin I. Welsh, Judge of the above entitled court, and a jury sworn to try the issues in the above cause, and which proceeded to trial on the 8th, 11th, 22nd, 26th and 29th days of December, 1941, on the complaint of the plaintiff for declaratory relief, etc., [60] and the answer and amendment to the answer of the defendants Charles Gromer Dickinson, Doris May Dickinson, William Kemp, and L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company", and also on the cross-claim of defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, against the plaintiff above named, and the answer of said plaintiff and cross-defendant to the said cross-claim of said defendants.

Myrick, Deering and Scott, by James Walter Scott, Esq., appeared as attorneys for plaintiff and cross-defendant above named; J. Oscar Goldstein, Esq., Burton J. Goldstein, Esq., and Emmett J. Seawell, Esq., appeared as attorneys for defendants and cross-claimants, Charles Gromer Dickinson and Doris May Dickinson, husband and wife; Geis & Hogle, Esqs., by Milton M. Hogle, Esq., appeared as attorney for defendant L. K. Fereva, individually, and doing business under the firm

name and style of "Fereva Chevrolet Company"; Erling S. Norby, Esq., appeared as attorney for defendant William Kemp.

Evidence both oral and documentary was offered and received on behalf of plaintiff and on behalf of said defendants and cross-claimants, and the case was argued to the court and jury, after which the jury by unanimous vote rendered the following two verdicts:

(1) We, the Jury in the above entitled action, find in favor of defendants Charles Gromer Dickinson and Doris May Dickinson, and against the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, and on the Cross-Complaint of said Defendants and Cross-Claimants Charles Gromer Dickinson and Doris May Dickinson, as husband and wife, we find in their favor and against the Plaintiff and Cross-Defendant General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, A Corporation, in the sum of Five Thousand Two Hundred and Sixty-One Dollars and Sixty-Five Cents (\$5,261.65), with interest thereon at the rate of Seven Per Cent (7%) per annum from December 7, 1940, until paid.

(2) We, the Jury in the above entitled action, find in favor of the defendants William Kemp and L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company". [61]

Now, Therefore, by virtue of the premises, the Court hereby adopts the verdicts as rendered by the Jury in the above entitled court and cause as set

out hereinabove, and which were duly recorded by the clerk of the court as the verdicts of the jury, and now makes its findings of fact and conclusions of law, to wit:

I.

That plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., brings this suit under and pursuant to the Federal Declaratory Judgment Act, (Judicial Code Section 274-D, 28 U. S. C. A. Section 400) and alleges:

II.

That plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of Scotland, and at all times herein mentioned said corporation was and is now engaged in the business of insurance against loss or damage arising out of liability; that said corporation is and was at all the times herein mentioned duly authorized, and licensed to do business in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

III.

That defendants Charles Gromer Dickinson and Doris May Dickinson are citizens of the State of California, and reside in the city of Chico, County of Butte, in said State;

That defendant William Kemp is a citizen of the State of California, and resides in the Town of Yuba City, County of Sutter, said State;

That defendant L. K. Fereva is a citizen of the State of California, and resides in the City of Lincoln, County of Placer, said State.

IV.

That the amount in controversy exclusive of interest and costs exceeds the sum of \$3,000.00. [62]

V.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code Section 274-D 28 U.S.C.A. Section 400).

VI.

That on or about the 6th day of December, 1939, plaintiff, issued a policy of automobile insurance to defendant L. K. Fereva; that the policy period was from December 16, 1939, to December 16, 1940, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant L. K. Fereva individually and doing business under the firm name and style of Fereva Chevrolet Company, to pay on behalf of said defendant L. K. Fereva, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums not exceeding \$7,500.00 for each person, and not exceeding \$30,000.00 for each accident, which said defendant L. K. Fereva should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury sustained by any person or persons, caused by accident, and arising out of the ownership, maintenance and use of a cer-

tain automobile covered by said policy of automobile insurance, to wit, a Cadillac Tow Car, Year 1924; that a true copy of said policy of insurance is attached to the complaint of plaintiff and marked "Exhibit A", to which reference is hereby expressly made, and the said "Exhibit A" is hereby made a part of this finding as if there fully set forth in detail.

VII.

That on the 25th day of February, 1940, at the hour of approximately 6:15 o'clock A.M. of said day, an accident occurred on U. S. Highway number 99-E, between the cities of Roseville and Lincoln, Placer County, California, at a point approximately two miles south of the City of Lincoln; that at that time and place defendant L. K. Fereva controlled and was using upon the shoulder of said U.S. Highway number 99-E the automobile tow truck covered by said policy of insurance; that in said [63] accident defendants Charles Gromer Dickinson, Doris May Dickinson and William Kemp received and sustained certain injuries to person and property; that on the 26th day of April, 1940, the defendant L. K. Fereva, on the request and suggestion of one Walter Henretty, an agent and employee of plaintiff, signed a written notice of accident prepared by said Walter Henretty to Plaintiff herein, advising plaintiff that said accident had occurred, and further advising plaintiff that an action for damages had been commenced against him by the said Charles Gromer Dickinson and Doris May Dickinson, And delivered to him the

summons and complaint which had been served upon him.

VIII.

That on or about the 12th day of April, 1940, defendants Doris May Dickinson and Charles Gromer Dickinson commenced an action for damages against defendant L. K. Fereva in the Superior Court of the State of California, in and for the County of Placer, entitled "Doris May Dickinson and Charles Gromer Dickinson, husband and wife, Plaintiffs, vs. L. K. Fereva, doing business under the firm name and style of "Fereva Chevrolet Co.", Richard Roe Company, a corporation, Henry Roe Company, a copartnership, John Doe First, John Doe Second and John Doe Third, Defendants, and numbered therein 11844; that a true copy of the complaint in said action is attached to the complaint of plaintiff and marked "Exhibit B" is hereby made a part of this finding as if here fully set forth in detail.

That on or about the 30th day of November, 1940, defendant William Kemp commenced an action for damages against defendant L. K. Fereva, in the Superior Court of the State of California, in and for the County of Butte, entitled "William Kemp, Plaintiff, vs. L. K. Fereva, individually, and doing business under the firm name and style of Fereva Chevrolet Company, Charles Dickinson, First Doe, Second Doe and Third Doe, a corporation, Defendants", and numbered therein 18256; that a true copy of the complaint in said action is attached to the complaint of plaintiff and marked "Exhibit

C", to which [64] reference is hereby expressly made, and the said "Exhibit C", is hereby made a part of this finding as if here fully set forth in detail.

X.

That said action so brought in the County of Placer by said Doris May Dickinson and Charles Gromer Dickinson came on regularly for trial before the court sitting with a jury; that thereafter and on or about the 6th day of December, 1940, judgment was duly given, made and entered on the verdict of said jury in favor of said Doris May Dickinson and Charles Gromer Dickinson, the plaintiffs therein, and against said defendant L. K. Fereva, in which said William Kemp seeks damage in the sum of \$7,905.00, and his costs of suit, is still pending therein, and has not yet been brought to trial.

XII.

That an actual controversy exists as between plaintiff and the defendants herein, as follows: Defendants Doris May Dickinson and Charles Gromer Dickinson contend that since the automobile referred to in the complaint in said action numbered 11844 is an automobile covered by the said insurance Policy, plaintiff herein has an obligation under said policy, it having been adjudged in said action that said Doris May Dickinson and Charles Gromer Dickinson have judgment against said defendant L. K. Fereva for the sum of \$5,000.00 and costs, to pay the said judgment to the said defendants

Doris May Dickinson and Charles Gromer Dickinson;

That defendant William Kemp contends that since the automobile referred to in his said complaint in said action numbered 18256 is covered by said insurance policy plaintiff herein is obliged under said policy to pay to said defendant William Kemp such sum or sums as he may recover as damages in said action against said defendant L. K. Fereva up to the aggregate amount of \$7,500.00;

[65]

Defendant L. K. Fereva contends that since said automobile referred to in the complaints in both of said actions is an automobile covered by the terms of said insurance policy, this plaintiff has the obligation under said policy to defend said L. K. Fereva in said actions, and further contends that plaintiff is under obligation to pay, and is liable to pay, any sums recovered, or to be recovered, as damages by said Doris May Dickinson, Charles Gromer Dickinson and William Kemp by reason of the alleged accident set forth in the complaints in said two actions, and that plaintiff herein has the obligation under said policy to pay said sums to said Doris May Dickinson, Charles Gromer Dickinson and William Kemp, up to the aggregate amount recovered, not to exceed \$7,500.00 to each of said three individuals.

On the other hand plaintiff herein denies and controverts said contentions, and each of them, and on its part contends that although the automobile referred to in the said two complaints was covered

by said policy of insurance plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned, and contends that it was released of all obligation and liability under said policy by reason of the failure of said defendant L. K. Fereva to notify plaintiff that any such accident occurred until sixty (60) days after it is alleged in the said complaints that the same did occur.

XIII.

That defendant L. K. Fereva requested plaintiff herein to defend herein and on his behalf said action brought by said Charles Gromer Dickinson and Doris May Dickinson and the said action brought by William Kemp; that plaintiff herein has defended the first of said actions subject; however, to an express and complete reservation of all rights of plaintiff, and that plaintiff, after the filing of the action by William Kemp, consented to defend said action subject, however, to an express [66] and complete reservation of all rights of plaintiff, but thereafter and on or about the 28th day of January, 1941, the said plaintiff withdrew from the defense of said action and denied any and all liability under said policy of insurance for any sums which may be due to any of the defendants herein.

XIV.

That a declaratory judgment or decree herein determining the rights and other legal relations of the parties hereto is necessary to enable plaintiff herein properly to reach its decision respecting

its continued defense of the action brought by William Kemp, and to protect plaintiff should it decide not to continue further with said defense, and to avoid the damages and loss that will result to plaintiff by reason of the accrual of expenses incident to the continuation of said defense; that the entry of a declaratory judgment or decree herein is necessary to avoid the loss and damages that will accrue, if any, to plaintiff in the event said action in said Superior Court should proceed to decision, and judgment should be entered therein for said William Kemp, since, in such event, unless a declaratory judgment or decree has been entered herein determining plaintiff's rights and liabilities under any judgment in said action in said Superior Court, plaintiff will be obliged to defend against the claims of defendants Doris May Dickinson, Charles Gromer Dickinson and William Kemp herein that plaintiff is liable to pay such judgments in said Superior Court actions up to the aggregate of \$7,500.00 and costs each.

XV.

That defendants Doris May Dickinson and Charles Gromer Dickinson should not be enjoined from undertaking to impose upon plaintiff herein liability, for the payment of the judgment heretofore rendered in their favor against defendant L. K. Fereva; that plaintiff is not now entitled to nor was it heretofore entitled to a preliminary injunction restraining the defendants herein, and each of them, and their respective attorneys, until

this court entered its final judgment and decree herein, from taking any further proceedings for the purpose of imposing any liability upon plaintiff herein based upon the judgment heretofore rendered in favor of Doris May Dickinson and Charles [67] Gromer Dickinson in said Superior Court action in the county of Placer, or based upon any judgment that may be rendered for said William Kemp in said Superior Court action in the County of Butte, and plaintiff herein will not suffer irreparable loss and/or any loss or damage in that plaintiff herein will be obliged to employ counsel to defend against said claims that plaintiff herein is liable to pay said judgments not to exceed the aggregate amount of \$7,500.00 in favor of each of the individual defendants, although plaintiff herein will have no right to recover the expenses that will be so incurred, or any part thereof, that the granting of such preliminary injunction is not necessary to avoid multiplicity of judicial proceedings in that any proceedings to impose liability upon plaintiff herein, based upon any judgment for said Doris May Dickinson and Charles Gromer Dickinson and William Kemp, or either or any of them, will present the same issues and questions as those presented by this suit for a declaratory judgment or decree.

XVI.

The court finds that the said contract of insurance herein referred to and marked "Exhibit A" of plaintiff's complaint contained the following provision:

7. Notice of Accident—Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses. If Claim is made or suit is brought against the insured, the insured shall immediately forward to the corporation every demand, notice, summons or other process received by him or his representative.”

The court finds that it is not true that said defendant L. K. Fereva on the 26th day of April, 1940, for the first time advised plaintiff that said accident had occurred on the 25th day of February, 1940, and that it is not true that until so advised, plaintiff had no information that an accident had occurred or that any action had been commenced; that it is not true, as plaintiff alleges in Paragraph VI of its complaint that it was released of any or all obligations and liability [68] under said policy of insurance so far as said accident is concerned, by reason of the failure of defendant L. K. Fereva to notify plaintiff that any such accident had occurred until 60 days after the said 25th day of February, 1940. In this connection the court specifically further finds as follows:

(a). That at all the times mentioned in the

complaint of plaintiff and on the 25th day of February, 1940, and for many years prior thereto, the defendant L. K. Fereva was an insurance agent for the plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, and that particularly on the 1st day of July, 1937, said plaintiff filed with the Insurance Commissioner of the State of California a notice of the appointment of said L. K. Fereva to act as its agent within the State of California until his license shall be denied, revoked or suspended, and that on said appointment there was issued by the Insurance Commissioner of the State of California to said L. K. Fereva an insurance agent's license which authorized said L. K. Fereva to act as an insurance agent for plaintiff in the County of Placer and to solicit, negotiate or effect contracts of insurance (except life and interinsurance) on behalf of plaintiff; that particularly for the fiscal year commencing July 1, 1939 and ending July 1, 1940, said L. K. Fereva was granted license No. 10513 by the Insurance Commissioner of the State of California; that on said appointment said L. K. Fereva yearly, commencing July 1, 1937 up to and including July 1, 1940, and ending with the fiscal year 1941, received his license from said insurance commissioner and acted as one of the agents for said company in said County of Placer; that during all of said period of time and for about five years prior to said July 1, 1937, said defendant L. K. Fereva solicited, negotiated and effected and caused to be issued as an

agent for said plaintiff numerous policies or contracts of insurance, acting in concert with and by and through Wentz & Erlin, the attorneys in fact for said plaintiff corporation in the State of California, who at all times herein mentioned have their [69] principal place of business at 206 Sansome Street, San Francisco, California, and that said policies of insurance thus contracted for and effected in behalf of plaintiff corporation by said L. K. Fereva included fire and theft, public liability, collision, property damages, comprehensive insurance and other kindred policies; that during the period of time herein mentioned said L. K. Fereva contracted for and effected in behalf of plaintiff corporation numerous policies of insurance of all types with said plaintiff corporation, by and through Wentz & Erlin, its attorneys in fact, and from time to time was paid and received the regular stipulated commissions for the obtaining of said business and acting as an insurance agent for said plaintiff corporation in the County of Placer in connection with said policies and contracts of insurance.

(b). That specifically from and after the said first day of July, 1937, said defendant L. K. Fereva was called upon to and did, in connection with his duties as agent for said plaintiff, report to said plaintiff company any and all accidents or loss or liability arising under any such policies issued by said plaintiff to him, or through him, as its agent and representative thereof by giving oral notice to said Wentz & Erlin at its agency office in Sacra-

mento or San Francisco; that it was not the practice or custom of said defendant L. K. Fereva, nor of said company, as far as said L. K. Fereva was concerned, to have said L. K. Fereva send in any written notices as agent for said company, but that all such notices of any liability or loss or any claim arising under any of the policies or contracts of indemnity insurance, collision insurance, public liability insurance, fire or theft or otherwise were all made by oral notices given by said L. K. Fereva to said Wentz & Erlin, and thereafter the same was always duly acted upon by said plaintiff corporation by and through their said attorneys in fact, Wentz & Erlin, who directly represented said plaintiff under a power of attorney in the State of California; that on numerous occasions up to and including the first day of July, 1941, that was the accepted, customary and followed [70] practice, mode and system of giving notice of any accident or loss to said plaintiff corporation by said L. K. Fereva of any accident or any loss sustained by said L. K. Fereva, or others reporting to him, as agent for said plaintiff corporation under any policy of insurance issued by the Plaintiff corporation to said L. K. Fereva individually or through him to third persons as plaintiff's agent and representative.

(c). That for many years prior to the 25th day of April, 1940, in the event of any report of an accident or claim for loss or indemnity on any of the contracts of insurance issued by plaintiff to, or through, said defendant L. K. Fereva as its

agent, said defendant L. K. Fereva orally notified said plaintiff corporation by notice given to one R. F. Urquhart, District Representative of the plaintiff corporation, and who was employed as such and directly represented Wentz & Erlin, and who maintained his headquarters in the branch office of said Wentz & Erlin in the City of Sacramento, State of California; that on such occasions, in the event of any accident or loss arising under any policy of insurance issued to, or written by, or through, said L. K. Fereva, said L. K. Fereva gave oral notice to said R. F. Urquhart of the happening of such accident or loss arising, and thereupon the same was duly recognized by plaintiff as a sufficient notice and compliance with the terms of the policies of insurance requiring written notice be given, and that the same became and was the accepted mode, system and custom of giving notice of claims or of accidents, or of any loss as between said plaintiff corporation and said defendant L. K. Fereva on any policies of insurance issued to, or written by or through him; that for the period of time herein mentioned said plaintiff corporation allowed and permitted said R. F. Urquhart to hold himself out to said defendant L. K. Fereva as the person to whom such oral notice of any accident or loss on any policies of insurance issued to said L. K. Fereva, or others by and through him, was to be given and that for a period of about six years prior to the 15th day of March, 1940, that condition continued and was

consistently followed by said defendant L. K. Fereva in the place and stead of any written notice, and [71] particularly in the cases of indemnity insurance policies as to public liability, property damage or collision insurance, that was the manner and form in which said defendant L. K. Fereva gave notice under Condition 7 of said policy of any accident or loss arising thereunder and, accordingly, said plaintiff is now estopped to deny said authority of said R. F. Urquhart to receive such notice of any loss from L. K. Fereva orally and from asserting or claiming as a defense as against said defendant L. K. Fereva or these defendants that notice of loss in connection with the accident referred to in plaintiff's complaint was not given in writing.

(d) That on the 16th day of December, 1939, the policy of insurance set out in the complaint of plaintiff became effective as to said defendant L. K. Fereva, doing business as "Fereva Chevrolet Company, and was in full force and effect until 12:01 AM December 16, 1940; that the accident referred to in plaintiff's complaint, which defendants Charles Gromer Dickinson and Doris May Dickinson and William Kemp herein were injured, occurred on February 25, 1940; that thereafter and within a period of about ten days, said defendant L. K. Fereva, following the accepted and usual mode, custom and procedure of notice to be given to plaintiff corporation, orally notified said R. F. Urquhart of the happening of said accident referred to in plaintiff's complaint, and did not ren-

der any written notice, or file any written notice with plaintiff by reason of his reliance on the previous practice, mode, conduct, attitude and relationship existing between said plaintiff and himself in reference to insurance policies issued by plaintiff to, or through, the agency of said L. K. Fereva, and which in case of accident or loss were reported to the plaintiff corporation orally by and through said R. F. Urquhart, District Representative of said Wentz & Erlin, attorneys in fact of said plaintiff corporation as above fully set forth.

(e) The court further finds that at the time of said accident, to wit, on the 25th day of February, 1940, said L. K. [72] Fereva was the agent of plaintiff in connection with the contract of liability insurance issued by it, effective as of December 16, 1939, and that in all respects all of his actions and conduct subsequent to said accident, including the oral notice given by him to said R. F. Urquhart and Wentz & Erlin were so done by him individually and pursuant to his status as an agent for said company and in line with his general authority and accepted practice, mode and custom in connection with notice of any accident or loss to be given said plaintiff company in the event of accident or loss under any policies of insurance issued by plaintiff to or written for said L. K. Fereva, as its agent, servant and employee.

(f) That said defendant L. K. Fereva, by reason of the facts and circumstances here in above set forth in subdivisions (a), (b), (c), (d) and (e), fully complied with the requirements set up and

considered the general practice, mode and custom of the plaintiff corporation in giving notice of any accident or injury, and within ten days after the 25th day of February, 1940 gave such notice orally to said R. F. Urquhart, District Representative of plaintiff corporation, who was apprised of the happening of said accident and who was under a duty and obligation forthwith to act thereon as he had done in similar instances for many years prior thereto in behalf of said plaintiff corporation.

(g) That by reason of all of the foregoing facts and circumstances herein alleged under subdivisions (a), (b), (c), (d), (e) and (f), said plaintiff waived the provision contained in paragraph 7 of the insurance contract in question requiring that written notice be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable, and that as far as these defendants are concerned all of the provisions of said paragraph 7 of the policy of insurance were duly waived by said plaintiff corporation, and moreover by reason of the facts and circumstances herein set forth so far these defendants are concerned, said plaintiff corporation is estopped from claiming any benefit by or through the provisions pertaining to written notice of accident required to be given and as referred to in condition 7 of said contract [73] of indemnity insurance, and is estopped from setting the same up as a defense to the rights of these defendants

herein, if any they have, under the terms of said contract of indemnity insurance referred to in plaintiffs complaint and marked "Exhibit A".

FINDINGS ON THE CROSS-CLAIM OF DEFENDANTS CHARLES GROMER DICKINSON AND DORIS MAY DICKINSON, HUSBAND AND WIFE.

XVII.

On the cross-claim of said defendants the court herewith refers to and expressly makes as a part of the findings as if here fully set forth in detail all of the findings here in above found and made in the above entitled court and cause, and set forth in Paragraphs I, II, III, IV, V, VI, VII, VIII, X, and XVI.

XVIII.

That on the 7th day of December, 1940, judgment was rendered by the Superior Court of the State of California, in and for the County of Placer, in said action above referred to and entitled, "Doris May Dickinson and Charles Gromer Dickinson, husband and wife, Plaintiffs, versus L. K. Fereva, doing business under the firm name and style of 'Fereva Chevrolet Company', Defendant", and numbered 11844 in the files of said court, by which judgment it was ordered, adjudged and decreed that the said Doris May Dickinson and Charles Gromer Dickinson, husband and wife, have and recover from the defendant, L. K. Fereva doing business under the firm name and style of "Fereva Chevrolet Company", the sum of \$5000.00,

and costs taxed in the sum of \$215.65, and accruing costs in the sum of \$1.00. That said judgment was rendered after trial by jury in which the jury rendered its verdict in favor of said Doris May Dickinson and Charles Gromer Dickinson, and against said L. K. Fereva, doing business under the firm name and style of "Fereva Chevrolet Company", in the said amount of \$5000.00, together with costs of suit in the sum of \$216.65.

XIX.

That said judgment was entered on the 7th day of December, 1940, as aforesaid, is now a final judgment, and that [74] no bond or undertaking has been posted for the payment thereof in any proceedings on appeal or otherwise, and no part of the said judgment has been paid by said L. K. Fereva or by anyone in his behalf to said defendants and cross-claimants, and that there is now due, owing and unpaid under and by virtue of the said judgment to said defendants and cross-claimants the sum of \$5,216.65, with interest thereon at the rate of 7 per cent per annum from the 7th day of December, 1940, until paid.

XX.

The court finds that the insured defendant L. K. Fereva doing business as "Fereva Chevrolet Company" duly and fully complied with all of the terms, covenants and conditions of the policy of insurance hereinbefore referred to and set out in plaintiff's complaint and marked "Exhibit A", and

that said defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, under condition 9 of said policy of insurance, are entitled to recover the full amount due them under the judgment obtained in the Superior Court of the State of California, in and for the County of Placer, and fully referred to and set out in the preceding finding XIX.

XXI.

That prior to the filing of the within action said Doris May Dickinson and Charles Gromer Dickinson, husband and wife, made due demand upon the cross-defendant for the payment of the whole of said judgment, with interest and costs thereon; that said cross-defendant, however, failed and refused to pay any part or portion thereof to said cross-claimants, and there is now wholly due, owing and unpaid under by virtue of the terms of the said policy of indemnity insurance, to cross-claimants herein from said plaintiff and cross-defendant, the sum of \$5,216.65, together with interest thereon at the rate of 7 percent per annum, from December 7, 1940, until paid, and no part of which has been paid.

GENERAL FINDINGS

XXII.

The court finds that all of the allegations of the plaintiff's complaint for declaratory relief, etc., are untrue [75] except as otherwise found, modified or changed in these findings.

XXIII.

The court finds that all of the allegations contained in the answers and amendment to the answers of defendants herein are true except as otherwise found, modified or changed in these findings.

XXIV.

The court finds that all of the allegations of the complaint of defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, are true, and the allegations of the answer of plaintiff and cross-defendant to said complaint of cross-claimants, except as otherwise found, modified or changed in these findings are untrue.

XXV.

The court finds that plaintiff and cross-defendant is not entitled to any injunctive relief whatever as prayed for in its complaint.

XXVI.

That good conscience and equity require that by reason of the facts and circumstances fully set forth in Finding XVI herein, defendant L. K. Fereva be relieved from his noncompliance with the terms and conditions of Condition 7 of said policy of insurance attached to and marked "Exhibit A" in plaintiff's complaint, and this court finds that in giving notice of the accident or injury within ten days after the 25th day of February 1940, orally to said R. F. Urquhart, district representative of plaintiff, which had been set up

and considered the general practice, made and custom of the plaintiff in giving notice of any accident or loss by said defendant L. K. Fereva for himself and others, and said plaintiff, having full knowledge of all the facts and circumstances, and its previous course of conduct with said L. K. Fereva, as fully set forth and found in Finding XVI herein, thereby intended to and in fact waived the provision contained in Condition 7 of the insurance contract in question, requiring that written notice be given by said L. K. Fereva to plaintiff, and said plaintiff is hence estopped from claiming [76] any benefit by or through the provision referred to as Condition 7 of said contract of Indemnity insurance, and is estopped from setting the same up as a defense to the rights of these defendants under the terms of said contract of indemnity insurance referred to in plaintiff's complaint and marked "Exhibit A", and which was introduced in evidence in the trial of said action and marked "Plaintiff's Exhibit 1".

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings; the court concludes:

1. That this court adjudge and decree the rights and legal relations of the parties hereto under and by reason of that certain policy of automobile insurance hereinabove referred to and dated December 16, 1939, and ending at 12.01 am, December 16, 1940, in order that such declaration have the force and effect of a final judgment and decree.

2. That a declaratory judgment or decree be entered herein determining that the said contract of insurance dated December 16, 1939, and marked "Exhibit A" in plaintiff's complaint, was and is in all respects a valid and subsisting contract made and entered into by and between plaintiff and defendant L. K. Fereva, and said plaintiff, under the terms of said policy of insurance, was and is under obligation to defend said L. K. Fereva in the actions filed against said L. K. Fereva by Charles Gromer Dickinson and Doris May Dickinson, his wife, filed in the Superior Court of the State of California, in and for the County of Placer, and in the action filed by William Kemp in the Superior Court of the State of California, in and for the County of Butte.

3. That this court adjudge and decree that plaintiff herein is fully and completely liable under all of the terms and conditions as set forth in said policy of automobile insurance by reason of the accident which occurred on February 25, 1940, and as set forth in the complaint in the said two actions brought in the Superior Courts of the State of California by [77] defendants Charles Gromer Dickinson nad Doris May Dickinson, husband and wife, and William Kemp.

4. That this court adjudge and decree that the insured defendant L. K. Fereva, doing business as "Fereva Chevrolet Company", duly and fully complied with all the terms, covenants and conditions of the policy of insurance hereinbefore re-

ferred to and set out in plaintiff's complaint and marked "Exhibit A", and that said defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, under Condition 9 of said policy of insurance, are entitled to recover the full amount due them under the judgment obtained in the Superior Court of the State of California, in and for the County of Placer.

5. That this court adjudge and decree that the accident referred to in plaintiff's complaint, in which defendants Charles Gromer Dickinson and Doris May Dickinson, his wife, and William Kemp were injured, occurred on February 25, 1940, that thereafter and within a period of about ten days, said defendant L. K. Fereva Insured under said policy of insurance marked plaintiff's "Exhibit A", following the accepted and usual mode, custom and procedure of notice to be given to plaintiff corporation, orally notified said plaintiff, by and through its district representative R. F. Urquhart, of the happening of said accident referred to in plaintiff's complaint, and said plaintiff accordingly within ten days of the happening of the accident, received said notice from said insured L. K. Fereva and said insured L. K. Fereva did not deliver or render any written notice or file any written notice with plaintiff by reason of his reliance on the previous practice, mode, conduct, attitude and relationship existing between said plaintiff and said L. K. Fereva in reference to insurance policies issued by plaintiff to, or through,

the agency of said L. K. Fereva, and which, in case of accident or loss, were reported to the plaintiff orally by and through said R. F. Urquhart, District Representative [78] of Wentz & Erlin, General Agents and Attorneys in Fact of said plaintiff corporation; that accordingly, the plaintiff is liable under said policy of automobile insurance for any sum or sums of money for which judgment was given to Charles Gromer Dickinson and Doris May Dickinson, husband and wife, arising out of said collision within the limits set forth in said policy of automobile insurance, and for any sum or sums which may be recovered by defendant William Kemp.

6. That this court adjudge and decree that said plaintiff waived the provision contained in Condition 7 of the automobile insurance contract in question, requiring that written notice be given by or on behalf of the insured L. K. Fereva to the plaintiff or any of its authorized agents as soon as practicable, and that as far as these defendants are concerned, all of the provisions of said Condition 7 of the policy of insurance in question were duly waived by said plaintiff; that this court adjudge and decree that good conscience and equity requires that defendant L. K. Fereva having given notice of the accident within ten days after the 25th day of February, 1940, orally to said R. F. Urquhart, district representative of plaintiff, which had been set up and considered the general practice, mode and custom of the plaintiff in giving notice of any accident or loss by said defendant,

L. K. Fereva for himself and others, and said plaintiff, having full knowledge of all of the facts and circumstances and its previous course of conduct with said insured L. K. Fereva, said plaintiff thereby intended to and, in fact waived the provisions contained in Condition 7 of the insurance contract in question, requiring that written notice be given by said insured L. K. Fereva to plaintiff, and said plaintiff is, hence, estopped from setting the same up as a defense to the rights of these defendants under the terms of said contract of indemnity insurance referred to in plaintiff's complaint and marked "Exhibit A",

7. That this court adjudge and decree that the preliminary injunction heretofore granted, restraining defendants herein, and each of them, and their respective attorneys, from taking any further proceedings in said actions in said Superior Courts in and for the County of Butte and in and for the County of [79] Placer, and from taking any proceeding for the purpose of imposing any liability upon plaintiff herein based upon any judgment that has been rendered in favor of cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, and which may be rendered to defendant William Kemp, be and the same is hereby dissolved and declared of no further force or effect, and that said plaintiff is not entitled to any preliminary or other injunction restraining the defendants herein or any of them from doing any of the acts set forth in plaintiff's complaint.

8. That this court adjudge and decree that, during all of the time mentioned in the complaint of plaintiff, plaintiff was obligated to defend the action hereinabove referred to, brought by Charles Gromer Dickinson and Doris May Dickinsons, husband and wife, in the Superior Court of the State of California, in and for the County of Placer, against said L. K. Fereva, and ever since the 7th day of December, 1940, was and now is obligated to pay any judgment obtained by said Charles Gromer Dickinson and Doris May Dickinson, his wife, as against said L. K. Fereva which judgment remained unpaid by said L. D. Fereva.

9. That this court adjudge and decree that all times mentioned in the complaint of plaintiff, plaintiff was obligated to defend the said action filed by William Kemp against L. K. Fereva, hereinabove referred to and brought in the Superior Court of the State of California, in and for the County of Butte, and that said defense be without any reservation of any alleged rights of non-liability upon the part of said plaintiff.

10. That defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, do have and recover judgment against said plaintiff and cross-defendant in the sum of Five Thousand Two Hundred Sixteen and 65/100 Dollars (\$5,216.65), together with interest thereon at the rate of 7 per cent per annum, from December 7, 1940, until paid.

11. That the complaint of the plaintiff, except, as otherwise provided for in these conclusions of

law, be in all other respects dismissed with prejudice. [80]

12. That defendants and cross-claimants recover their costs of suit herein.

13. Let judgment be entered accordingly.

Dated this day of January, 1942.

.....

District Judge

[Endorsed]: Lodged Jan. 8, 1942. [81]

[Title of District Court and Cause.]

JUDGMENT AND DECREE

The above entitled cause came on regularly for trial in the above entitled court before the Honorable Martin I. Welsh, Judge of the above entitled court, and a jury sworn to try the issues in the above cause, and which proceeded to trial on the 8th, 11th, 22nd, 23rd, 26th and 29th days of December, 1941, on the complain of the plaintiff for declaratory relief, etc., and the answer and amendment to the answer of the defendants Charles Gromer Dickinson, Doris May Dickinson, William Kemp, and L. K. [82] Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company", and also on the cross-claim of defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, against the plaintiff above named, and the answer of said plaintiff and cross-defendant to the said cross-claim of said defendants; Myrick, Deering and Scott,

Esq., appeared as attorneys for plaintiff and cross-defendant above named; J. Oscar Goldstein, Esq., Burton J. Goldstein, Esq., and Emmett J. Seawell, Esq., appeared as attorneys for defendants and cross-claimants, Charles Gromer Dickinson and Doris May Dickinson, husband and wife; Geis & Hogle, Esqs., by Milton M. Hogle, Esq., appeared as attorney for defendant L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company"; Erling S. Norby, Esq., appeared as attorney for defendant William Kemp; and evidence both oral and documentary having been introduced and the cause submitted to the court for consideration and decision, and after due deliberation thereon, the court having adopted the verdicts as rendered by the jury in the above entitled court and cause, and having made and caused to be filed its written findings of fact and conclusions of law, and ordered that a judgment be entered in accordance therewith;

Wherefore, By Reason of the Law and Findings of Fact Aforesaid, It Is Hereby Ordered, Adjudged and Decreed as Follows:

I.

That this court adjudges and decrees the rights and legal relations of the parties hereto under and by reason of that certain policy of automobile insurance dated December 16, 1939, and ending at 12:01 a.m. December 16, 1940, in order that such declaration have the force and effect of a final judgment and decree.

II.

That a declaratory judgment and decree be and the same is hereby entered herein determining that the said contract of insurance dated December 16, 1939, and marked "Exhibit A" in plaintiff's complaint, copy of which is hereunto attached and [83] marked "Exhibit A", was and is in all respects a valid and subsisting contract made and entered into by and between plaintiff and defendant L. K. Fereva, and said plaintiff, under the terms of said policy of insurance, was and is under obligation to defend said L. K. Fereva in the actions filed against said L. K. Fereva by Charles Gromer Dickinson and Doris May Dickinson, his wife, filed in the Superior Court of the State of California, in and for the County of Placer, and in the action filed by William Kemp in the Superior Court of the State of California, in and for the County of Butte.

III.

That this court adjudges and decrees that plaintiff herein is fully and completely liable under all of the terms and conditions as set forth in said policy of automobile insurance by reason of the accident which occurred on February 25, 1940, and as set forth in the complaint in the said two actions brought in the Superior Courts of the State of California by defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, and William Kemp.

IV.

That this court adjudges and decrees that the insured defendant L. K. Fereva, doing business as "Fereva Chevrolet Company", duly and fully complied with all the terms, covenants and conditions of the policy of insurance hereinbefore referred to and set out in plaintiffs complaint and marked "Exhibit A", copy of which is hereunto attached and marked "Exhibit A", and that said defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, under Condition 9 of said policy of insurance, are entitled to recover the full amount due them under the judgment obtained in the Superior Court of the State of California, in and for the County of Placer.

V.

That this court adjudges and decrees that the accident referred to in plaintiff's complaint, in which defendants Charles Gromer Dickinson and Doris May Dickinson, his wife and William Kemp were injured, occurred in February 25, 1940; that thereafter [84] and within a period of about ten days, said defendant L. K. Fereva, the insured under said policy of insurance marked plaintiff's "Exhibit A", copy of which is hereunto attached and marked "Exhibit A", following the accepted and usual mode, custom and procedure of notice to be given to plaintiff corporation, orally notified said plaintiff, by and through its district representative R. F. Urquhart, of the happening of said accident referred to in plaintiff's complaint, and

said plaintiff accordingly, within ten days of the happening of the accident, received said notice from said insured L. K. Fereva, and said insured L. K. Fereva did not deliver or render any written notice or file any written notice with plaintiff by reason of his reliance on the previous practice, made, conduct, attitude and relationship existing between said plaintiff and said L. K. Fereva in reference to insurance policies issued by plaintiff to, or through, the agency of said L. K. Fereva, and which, in case of accident or loss, were reported to the plaintiff orally by and through said R. F. Urquhart, District Representative of Wentz & Erlin, General Agents and Attorneys in Fact of said plaintiff corporation; that accordingly, the plaintiff is liable under said policy of automobile insurance for any sum or sums of money for which judgment was given to Charles Gromer Dickinson and Doris May Dickinson, husband and wife, arising out of said collision within the limits set forth in said policy of automobile insurance, and for any sum or sums which may be recovered by defendant William Kemp.

VI.

That this court adjudges and decrees that said plaintiff waived the provisions contained in Condition 7 of the automobile insurance contract in question, requiring that written notice be given by or on behalf of the insured L. K. Fereva to the plaintiff or any of its authorized agents as soon as practicable, and that as far as these defendants are con-

cerned, all of the provisions of said Condition 7 of the policy of insurance in question were duly waived by said plaintiff; that this court adjudges and decrees that good conscience and equity requires that defendant L. K. Fereva having given notice of the accident within ten days after the 25th day of February, 1940, orally to said R. F. Urquhart, [85] district representative of plaintiff, which had been set up and considered the general practice, mode and custom of the plaintiff in giving notice of any accident or loss by said defendant L. K. Fereva for himself and others, and said plaintiff, having full knowledge of all of the facts and circumstances and its previous course of conduct with said insured, L. K. Fereva said plaintiff thereby intended to and, in fact, waived the provisions contained in Condition 7 of the insurance contract in question, requiring that written notice be given by said insured L. K. Fereva to plaintiff, and said plaintiff is, hence, estopped from setting the same up as a defense to the rights of these defendants under the terms of said contract or indemnity insurance referred to in plaintiff's complaint, copy of which is attached hereto and marked "Exhibit A".

VII.

That this court adjudges and decrees that the preliminary injunction heretofore granted, restraining defendants herein, and each of them, and their respective attorneys, from taking any further proceedings in said actions in said Superior Courts in and for the County of Butte and in and for

the County of Placer, and from taking any proceeding for the purpose of imposing any liability upon plaintiff herein based upon any judgment that has been rendered in favor of cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, and which may be rendered to defendant William Kemp, be and the same is hereby dissolved and declared of no further force or effect, and that said plaintiff is not entitled to any preliminary or other injunction restraining the defendants herein or any of them from doing any of the acts set forth in plaintiff's complaint.

VIII.

That this court adjudges and decrees that, during all of the times mentioned in the complaint of plaintiff, plaintiff was obligated to defend the action hereinabove referred to, brought by Charles Gromer Dickinson and Doris May Dickinson, husband and wife, in the Superior Court of the State of California [86] in and for the County of Placer, against said L. K. Fereva, and ever since the 7th day of December, 1940, was and now is obligated to pay any judgment obtained by said Charles Gromer Dickinson and Doris May Dickinson, his wife, as against said L. K. Fereva.

IX.

That this court adjudges and decrees that at all times mentioned in the complaint of plaintiff, plaintiff was obligated to defend the said action filed by William Kemp against L. K. Fereva, here-

inabove referred to and brought in the Superior Court of the State of California, in and for the County of Butte, and that said defense be without any reservation of any alleged rights of non-liability upon the part of said plaintiff:

X.

That defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, do have and are hereby granted judgment against said plaintiff and cross-defendant General Accident Fire and Life Assurance Corporation, Ltd., a corporation, in the sum of Five Thousand Two Hundred Sixteen and 65/100 Dollars (\$5,216.65), together with interest thereon at the rate of 7 per cent per annum from December 7, 1940, until paid.

XI.

That the complaint of the plaintiff, except as otherwise provided *fo* in this judgment and decree, be in all other respects dismissed with prejudice.

XII.

That the defendants and cross-claimants above named do recover against said plaintiff and cross-defendant their costs incurred in this action in the sum of \$.....

Dated this day of January, 1942.

.....
District Court [87]

[Title of District Court and Cause.]

AMENDMENTS, OBJECTIONS AND EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW HERETOFORE SUBMITTED BY DEFENDANTS.

Plaintiff herein submits the following amendments, objections and exceptions to the findings of fact and conclusions of law submitted by defendants as follows:

1. On page 3, lines 1 to 6, strike out the following language, "the court hereby adopts the verdicts as rendered by the Jury in the above entitled court and cause as set out hereinabove and which were duly recorded by the clerk of the court as [88] the verdicts of the jury," and insert in place thereof the following language: "The court refuses to accept or adopt the said verdicts as rendered by the jury".

Said amendment is suggested upon the following grounds, namely: The said verdicts, and each thereof, should be modified or vacated by reason of the insufficiency of the evidence herein to justify said verdicts, or either thereof, and that said verdicts are and each of them is against law; also upon the ground of errors at law occurring at the trial and excepted to by this plaintiff; upon the ground that said verdicts, and each thereof, are contrary to the evidence; upon the ground that the verdicts, and each thereof, purport to decide not only legal but equitable issues; that certain

equitable issues, to wit, waiver and estopped, are purportedly covered by said verdicts, and each thereof, and are in essence equitable issues for determination of the Court alone; that said issues relative to alleged waiver and estoppel are not, neither is either one of them, triable by a jury under the declaratory judgment act, or equitable procedure.

That said verdicts, and each thereof, are purely advisory and that they are not, nor is either of them, sustained by the evidence or in conformity with law or equity.

2. Strike out all of the proposed findings beginning with the words "the defendant" down to and including the word "him", page 5, line 17, reading as follows: "the defendant L. K. Fereva on the request and suggestion of one Walter Henretty, an agent and employee of plaintiff, signed a written notice of accident prepared by said Walter Henretty to plaintiff herein, advising plaintiff that said accident had occurred, and further advising plaintiff that an action for damages had been commenced against him by the said Charles Gromer Dickinson and Doris May Dickinson, and delivered to him the summons and complaint which had been served upon him.", and insert in lieu thereof the following: [89] "the defendant L. K. Fereva first gave plaintiff written notice of said accident."

3. Page 8, lines 6 to 8, strike out the language beginning "to notify plaintiff", and insert in lieu thereof the following: "to give plaintiff written no-

tice of said accident until more than sixty days after its occurrence.”

4. Page 8, lines 10 to 11, strike out the words, “That defendant L. K. Fereva requested plaintiff herein to defend herein and on his behalf said action”, and in lieu thereof substitute the words “That plaintiff offered to defend said L. K. Fereva under full reservation of rights, which said offer said L. K. Fereva accepted, and plaintiff did with said reservation of rights give defense for him and on his behalf in said action”.

5. At page 9, lines 9 to 11, strike out the following: “that plaintiff is liable to pay such judgments in said Superior Court actions up to the aggregate of \$7,500.00 and costs each.”

6. At page 9, line 13 and following, strike out all of paragraph XV.

7. On page 10, strike outlines 19-to 31, and insert in lieu thereof the following: “The court finds that it is true that L. K. Fereva did on the 26th day of April, 1940, for the first time give written notice to plaintiff that said accident had occurred on the 25th day of February, 1940; that until so advised plaintiff has no information that an accident had occurred or that any action had been commenced: that plaintiff was released of any and all obligations and liability under said policy of insurance so far as said accident is concerned by reason of the failure of defendant L. K. Fereva to give written notice to plaintiff of the occurrence of said accident as required by said paragraph 7 of said contract of insurance marked exhibit “A”.

8. Strike out beginning at line 32, page 10, down to and including line 16 page 16, the same constituting paragraph XVI, sub-divisions a to g inclusive, and each and every part thereof, upon the ground that said L. K. Fereva was at all of the times therein mentioned an agent of the plaintiff corporation; that [90] as such agent it was incumbent upon him to exercise the utmost fidelity and reasonable diligence to report to his principal information relative to said principal's business; that as an insured under the said contract of insurance it was his duty to give written notice as soon as practicable after the happening of an accident covered by the said policy; that the terms and conditions of the said policy are clear and explicit; that there is no evidence herein that the said terms and all thereof were not clearly and thoroughly understood by the said L. K. Fereva; that there is no ambiguity with reference to the terms of said policy which requires that it be supplemented by evidence herein that said L. K. Fereva gave no written notice whatever to the plaintiff, or to any agent or agents of the plaintiff, prior to April 26, 1940; that there is no evidence showing or tending to show that any representation was made to said L. K. Fereva that the provisions contained in paragraph 7 above referred to were or would be waived; that under the provision of paragraph 12 of said contract of insurance no agent or agents of plaintiff corporation has authority or power to change or alter any provisions of condition of said contract of insurance, including those contained in

paragraph 7; that in and by said paragraph 12 it is provided as follows; "No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the corporation from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part thereof, signed by the United States Manager."

That the evidence is insufficient to show that any alleged notice given by Fereva to Urquhart complied with condition 7 of said policy.

That the foregoing amendments, objections and exceptions are proposed with reference to each and every the findings submitted by defendants and cross-complainants in connection with their [91] cross-claims and answers, and to the general findings following the same insofar as they are relevant and applicable thereto.

Dated: January 26, 1942.

Respectfully submitted,

MYRICK & DEERING AND
SCOTT

JAMES WALTER SCOTT

Attorneys for plaintiff and
Cross-Defendant.

[Endorsed]: Filed Jan. 27, 1942. [92]

[Title of District Court and Cause.]

FINDINGS

The above entitled cause came on regularly for trial in the above entitled court before the Honorable Martin I. Welsh, Judge of the above entitled court, and a jury sworn to try the issues in [93] the above cause. It proceeded to trial on the 8th, 11th, 22nd, 23rd, 26th, and 29th days of December, 1941, on the complaint of the plaintiff for declaratory relief, etc., and the answer and amendment to the answer of the defendants Charles Gromer Dickinson, Doris May Dickinson, William Kemp, and L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company" and also on the cross-claim of defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, against the plaintiff above named, and the answer of said plaintiff and cross-defendant to the said cross-claim of said defendants; Myrick, Deering and Scott, Esq., appeared as attorneys for plaintiff and cross-defendant above named; J. Oscar Goldstein, Esq., Burton Goldstein, Esq., and Emmett J. Seawell, Esq., appeared as attorneys for defendants and cross-claimants, Charles Gromer Dickinson and Doris May Dickinson, husband and wife; Geis & Hogle, Esqs., by Milton M. Hogle, Esq., appeared as attorney for defendant L. K. Fereva, individually, and doing business under the firm name and

style of "Fereva Chevrolet Company"; Erling S. Norby, Esq., appeared as attorney for defendant William Kemp; and evidence both oral and documentary having been introduced and the cause submitted to the court for consideration and decision, the court makes and files its written Findings of Fact and Conclusions of Law and orders that the judgment be entered in accordance therewith.

The court hereby finds as follows:—

1.

That plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of Scotland, and at all times herein mentioned said corporation [94] was and is now engaged in the business of insurance against loss or damage arising out of liability; that said corporation is and was at all the times herein mentioned duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

2.

That defendants Charles Gromer Dickinson and Doris May Dickinson are citizens of the State of California, and reside in the City of Chico, County of Butte, in said State;

That defendant William Kemp is a citizen of the State of California, and resides in the Town of Yuba City, County of Sutter, said State;

That defendant L. K. Fereva is a citizen of the State of California, and resides in the City of Lincoln, County of Placer, said State.

3.

That the amount in controversy exclusive of interest and costs exceeds the sum of \$3,000.00.

4.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code Section 274-D, 28 U.S.C.A. Section 400).

5.

That on or about the 6th day of December, 1939, plaintiff issued a policy of automobile insurance to defendant L. K. Fereva; that the policy period was from December 16, 1939, to December 16, 1940, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant L. K. Fereva individually and doing business under the firm name and style of [95] Fereva Chevrolet Company, to pay on behalf of said defendant L. K. Fereva, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums not exceeding \$7,500.00 for each person, and not exceeding \$30,000.00 for each accident, which said defendant L. K. Fereva should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury sustained by any person or persons, caused by accident, and aris-

ing out of the ownership, maintenance and use of a certain automobile covered by said policy of automobile insurance, to-wit: a Cadillac Tow Car, Year 1924; that a true copy of said policy is attached to the complaint herein and marked Exhibit "A".

6.

That on the 25th day of February, 1940, at the hour of approximately 6:15 o'clock A.M. of said day, an accident occurred on U. S. Highway number 99-E, between the cities of Roseville and Lincoln, Placer County, California, at a point approximately two miles south of the City of Lincoln; that at that time and place defendant L. K. Fereva controlled and was using upon the shoulder of said U. S. Highway number 99-E the automobile tow truck covered by said policy of insurance; that in said accident defendants Charles Gromer Dickinson, Doris May Dickinson and William Kemp received and sustained certain injuries to person and property; that on or about the 26th day of April, 1940, the defendant L. K. Fereva for the first time advised plaintiff that said accident had occurred, and that an action for damages had been commenced against him by the said Charles Gromer Dickinson and Doris May Dickinson, and that summons and complaint had been served upon him; that until so advised plaintiff had no information that an accident had occurred or that any action had been commenced; that plaintiff [96] was released of all obligations and liability under said policy of insurance so far as said accident is concerned by rea-

son of the failure of defendant L. K. Fereva to notify plaintiff that any such accident had occurred until sixty (60) days after said 25th day of February, 1940.

7.

That on or about the 12th day of April, 1940, defendants Doris May Dickinson and Charles Gromer Dickinson commenced an action for damages against defendant L. K. Fereva in the Superior Court of the State of California, in and for the County of Placer, entitled "Doris May Dickinson and Charles Gromer Dickinson, husband and wife, Plaintiffs, vs. L. K. Fereva, doing business under the firm name and style of 'Fereva Chevrolet Co.', Richard Roe Company, a corporation, Henry Roe Company, a copartnership, John Doe First, John Doe Second and John Doe Third, Defendants, and numbered therein 11844.

8.

That on or about the 30th day of November, 1940, defendant William Kemp commenced an action for damages against defendant L. K. Fereva, in the Superior Court of the State of California, in and for the County of Butte, entitled "William Kemp, Plaintiff, vs. L. K. Fereva, individually, and doing business under the firm name and style of Fereva Chevrolet Company, Charles Dickinson, First Doe, Second Doe and Third Doe, a corporation, Defendants", and numbered therein 18256.

9.

That said action so brought in the County of Placer by said Doris May Dickinson and Charles Gromer Dickinson came on regularly for trial before the court sitting with a jury; that thereafter and on or about the 6th day of December, 1940, judgment was duly [97] given, made and entered on the verdict of said jury in favor of said Doris May Dickinson and Charles Gromer Dickinson, the plaintiffs therein, and against said L. K. Fereva doing business under the firm name and style of Fereva Chevrolet Co., defendant, in the sum of \$5,000.00, and costs of suit in the sum of \$216.65.

10.

That the said action brought in the County of Butte by said defendant William Kemp, plaintiff therein, against said defendant L. K. Fereva, in which said William Kemp seeks damages in the sum of \$7,905.00, and his costs of suit, is still pending therein, and has not yet been brought to trial.

11.

That an actual controversy exists as between plaintiff and the defendants herein, as follows: Defendants Doris May Dickinson and Charles Gromer Dickinson contend that since the automobile referred to in the complaint in said action numbered 11844 is an automobile covered by the said insurance policy, plaintiff herein has an obligation under said policy, it having been adjudged in said action that said Doris May Dickinson and Charles Gromer Dickinson have judgment against said defend-

ant L. K. Fereva for the sum of \$5,000.00 and costs, to pay the said judgment to the said defendants Doris May Dickinson and Charles Gromer Dickinson;

That defendant William Kemp contends that since the automobile referred to in his said complaint in said action numbered 18256 is covered by said insurance policy plaintiff herein is obliged under said policy to pay to said defendant William Kemp such sum or sums as he may recover as damages in said action against said defendant L. K. Fereva up to the aggregate amount of \$7,500.00;

Defendant L. K. Fereva contends that since said automobile referred to in the complaints in both of said actions is an automobile [98] covered by the terms of said insurance policy, this plaintiff has the obligation under said policy to defend said L. K. Fereva in said actions, and further contends that plaintiff is under obligation to pay, and is liable to pay, any sums recovered, or to be recovered, as damages by said Doris May Dickinson, Charles Gromer Dickinson and William Kemp by reason of the alleged accident set forth in the complaints in said two actions, and that plaintiff herein has the obligation under said policy to pay said sums to said Doris May Dickinson, Charles Gromer Dickinson and William Kemp, up to the aggregate amount recovered, not to exceed \$7,500.00 to each of said three individuals.

On the other hand plaintiff herein denies and controverts said contentions, and each of them, and on its part contends that although the automobile

referred to in said two complaints was covered by said policy of insurance plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned, and contends that it was released of all obligations and liability under said policy by reason of the failure of said defendant L. K. Fereva to notify plaintiff that any such accident occurred until sixty (60) days after it is alleged in the said complaints that the same did occur.

12.

That defendant L. K. Fereva has requested plaintiff herein to defend in his name and on his behalf said action brought by Doris May Dickinson and Charles Gromer Dickinson, and the said action brought by William Kemp; that plaintiff herein has defended the first of said actions, subject, however, to an express and complete reservation of all rights of plaintiff, and that plaintiff has consented to defend said action brought by William Kemp, subject, however, to an express and complete reservation of all rights [99] of plaintiff, and has defended said action hitherto, and said action brought by William Kemp is now at issue; that plaintiff has withdrawn from the defense of said action.

13.

The court further finds that a declaratory judgment or decree herein determining the rights and other legal relations of the parties hereto is necessary to adjudicate and determine the rights, legal obligations and responsibilities of the plaintiff

herein, if any there are, to the various defendants herein; to determine whether or not plaintiff herein should pay the judgment heretofore rendered in favor of Doris May Dickinson and Charles Gromer Dickinson against L. K. Fereva; to determine whether plaintiff should further defend the action at law above referred to brought by William Kemp against said L. K. Fereva, and its liability, if any there be, to pay and discharge any judgment rendered in the said action brought by William Kemp, and also to determine its rights, duties and obligations, if any there be, with reference to L. K. Fereva, its assured.

14.

The court further finds that in said policy of insurance hereinabove referred to as Exhibit "A", it was provided in condition number 7 thereof as follows: "Notice of Accident—Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses. If claim is made or suit is brought against the insured, the insured shall immediately forward to the corporation every demand, notice, summons or other process received by him or his representative." [100]

The court further finds that upon the occurrence of the accident referred to herein, namely on February 25, 1940, written notice was not given by said L. K. Fereva, the assured under said policy of insurance, or on behalf of said insured, to the plaintiff or any of its authorized agents as soon as practicable; that no notice whatever was given to plaintiff prior to April 26, 1940; that prior to said April 26, 1940, no notice was given by said L. K. Fereva to plaintiff in writing or otherwise containing particulars sufficient to identify the insured, or reasonably obtainable information respecting the time, place and circumstances of the said accident, the names and addresses of the injured and of available witnesses, or any of the said items; the court further finds that there was no waiver or change made or effected in any part of the said policy of insurance and that the plaintiff is not estopped from asserting its rights herein under the terms of said policy, and that no terms of the said policy are or have been waived or changed by any course of conduct pursued by the plaintiff herein.

15.

The court further finds that as an agent of the plaintiff corporation said L. K. Fereva was under obligation to give notice of claims or of accidents to plaintiff having to do with any loss or liability that may have been sustained or incurred by plaintiff corporation, and that was or had been brought to the attention of the said L. K. Fereva as such agent; that in addition thereto and separate and

distinct therefrom there was an obligation on the part of said L. K. Fereva as an assured under the said policy of insurance hereinabove referred to to give written notice to the plaintiff corporation in conformity with condition 7 of the said policy of insurance; that said L. K. Fereva did not give such notice, or any notice prior to April 26, 1940. [101]

As conclusions of law from the foregoing the court hereby finds that plaintiff should have judgment herein as prayed for, and that defendants take nothing by their answers or cross-complaints herein.

Let judgment be entered accordingly.

Dated: September 24, 1942.

MARTIN I. WELSH,
Judge.

[Endorsed]: Filed Sep. 24, 1942. [102]

In the District Court of the United States, Northern District of California, Northern Division

Equity No. 4287-L

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation,

Plaintiff,

vs.

CHARLES GROMER DICKINSON, DORIS MAY DICKINSON, WILLIAM KEMP, and L. K. FERREVA, individually, and doing business under the firm name and style of "FERREVA CHEVROLET COMPANY",

Defendants.

CHARLES GROMER DICKINSON and DORIS MAY DICKINSON, husband and wife,

Cross-Claimants.

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND, a corporation,

Cross-Defendant.

JUDGMENT AND DECREE

The above entitled cause came on regularly for trial in the above entitled court before the Honorable Martin I. Welsh, Judge of the above entitled court, and an advisory jury sworn to try the

issues in the above cause, which returned two verdicts.

Thereupon defendants and cross-complainants moved the said advisory verdicts be adopted by the court and after argument by counsel and the filing of briefs herein all of said parties submitted the cause to the court for consideration and decision, and requested the court to give and make its written Findings of Fact and Conclusions of Law.

The court thereupon set aside said advisory verdicts, and each thereof, as the court finds they are, and each of them is, entirely unsupported by the evidence, and as requested by the parties herein the court has made and filed its written Findings of Fact and Conclusions of Law, to which reference is hereby made, and which said Findings and Conclusions are made a part hereof.

The Court, being fully advised in the premises, now therefore upon consideration thereof it is this day

1. Adjudged, Ordered and Decreed that the plaintiff, General Accident Fire and Life Assurance Corporation, Ltd., a corporation, has no obligation under the policy of automobile insurance issued to defendant L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company", on or about the 6th day of December, 1939, which said policy is referred to in plaintiff's complaint herein, to defend said L. K. Fereva in the said actions in said complaint referred to brought respectively in the Superior Court of the County of Butte, State of California;

that plaintiff [103] herein has no liability under the said policy of insurance by reason of the alleged accident set forth in the complaint of plaintiff to indemnify the said L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company," Charles Gromer Dickinson, Doris May Dickinson, or William Kemp, or any thereof, for loss or damages because of injury to persons or destruction of property, including the loss of use thereof, caused by the accident which occurred on the 25th day of February, 1940, on U. S. Highway 99-E, between the cities of Roseville and Lincoln, Placer County, California, at a point approximately two miles south of the city of Lincoln.

2. It Is Further Adjudged, Ordered and Decreed that the plaintiff was released and discharged of all obligations and liability under said policy by reason of the failure of said defendant L. K. Fereva to notify plaintiff that any such accident occurred within sixty (60) days after the occurrence thereof.

3. It Is Further Adjudged, Ordered and Decreed that the plaintiff herein is under no liability for the payment of the judgment heretofore rendered in favor of Doris May Dickinson and Charles Gromer Dickinson, against defendant L. K. Fereva in the action brought by them against him in the Superior Court of the County of Placer, State of California, numbered 11844 in the records and files of said court, or any part or portion of said judgment; that plaintiff herein is under no liability by

reason of the issuance of the said policy to pay any judgment that may be recovered by defendant William Kemp in said Superior Court action in the County of Butte, State of California, numbered 18256, in the records and files of said court, or any part or portion of such judgment.

4. It Is Further Adjudged, Ordered and Decreed that the defendants Doris May Dickinson, Charles Gromer Dickinson, William Kemp, and L. K. Fereva, individually and doing business under the [104] firm name and style of "Fereva Chevrolet Company", their and each of their agents and attorneys, are, and each of them is, restrained and enjoined from instituting or proceeding with any suit or action against the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, based upon any alleged liability to them, or either or any of them, arising out of or based upon the execution and issuance of the said policy of insurance.

5. It Is Further Adjudged, Ordered and Decreed that defendants and cross-complainants take nothing herein; that no costs be recovered herein by plaintiff against the defendants and cross-complainants.

Done in open court this 8th day of October, 1942.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed Oct. 9, 1942. [105]

[Title of District Court and Cause.]

PETITION AND MOTION FOR NEW TRIAL

Come now the defendants and cross-claimants above named and by their attorneys J. Oscar Goldstein, Esq., Milton M. Hogle, Esq., and Erling S. Norby, Esq., respectfully petition the above entitled Honorable Court for a new trial of the above entitled [106] cause, after judgment was rendered by Honorable Martin I. Welsh in favor of plaintiff and cross-defendant and against defendants and cross-claimants in the above entitled court and cause, upon the following grounds and causes materially affecting the substantial rights of the defendants and cross-claimants:

I.

Insufficiency of the evidence to justify the decision and judgment of the Court.

II.

Insufficiency of the evidence to justify the decision and judgment, in that it is against law.

III.

Errors in law occurring at the trial.

IV.

Insufficiency of the evidence to justify the decision and judgment of the court for the following reasons:

(a) That it affirmatively appears and the evidence is conclusive that the plaintiff is liable under

all of the terms and conditions as set forth in the policy of automobile insurance by reason of the accident which occurred on February 25, 1940, and particularly to defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife.

(b) That it affirmatively appears and the evidence is undisputed in favor of the defendants and cross-claimants that the insured defendant L. K. Fereva, doing business as "Fereva Chevrolet Company", duly and fully complied with all the terms, covenants and conditions of the policy of insurance set out in plaintiff's complaint and marked "Exhibit A", and that said defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, under condition 9 of said policy of insurance are entitled to recover the full amount due them under the judgment obtained in the Superior Court of the State of California, in and for the [107] County of Placer.

(c) That it affirmatively appears from the evidence and is undisputed that the insured informed the plaintiff and cross-defendant company of the accident within ten (10) days after the occurrence of the accident, and that no prejudice of any kind resulted to said plaintiff and cross-defendant company to any degree whatsoever.

(d) That it affirmatively appears and the evidence is conclusive that plaintiff and cross-defendant company was not relieved of liability by the failure of the insured to comply with condition 7 of the policy requiring immediate written notice

of the accident with said company, because all of the provisions of said condition 7 of the policy of insurance in question were duly waived by said plaintiff and cross-defendant company.

(e) That it affirmatively appears and the evidence is conclusive that defendant L. K. Fereva gave due notice of the accident within ten (10) days after the 25th day of February, 1940, orally to R. F. Urquhart, district representative of plaintiff and cross-defendant company, which had been set up and considered the general practice, mode and custom of the plaintiff company in giving notice to said company of any accident or loss by said defendant L. K. Fereva for himself and others, thereby waiving the provisions contained in condition 7 of the insurance contract in question, and said plaintiff and cross-defendant is hence estopped from setting up the provisions of condition 7 as a defense to the rights of defendants and cross-claimants under said contract of indemnity insurance.

(f) That while it is the established law that the failure of the assured to comply with the condition of the policy, requiring immediate written notice of the accident under certain conditions, relieves the plaintiff company from liability [108] on the judgment, nevertheless in the instant case the evidence is undisputed that the company waived said provisions relative to written notice, and further, that no prejudice resulted to plaintiff company from the failure of the assured to give such

immediate written notice as provided by condition 7, and that said assured L. K. Fereva cooperated with plaintiff company in every way to defeat the action filed against him in the lower court by the Dickinsons and fully and completely made a substantial compliance with the terms and conditions of his policy of indemnity insurance.

(g) That it affirmatively appears that defendants and cross-claimants were entitled as a matter of law to a jury trial of the issues involved in the action filed by plaintiff and cross-defendant; that the verdict of the jury finding in favor of defendants and cross-claimants and against the plaintiff company was determinative of all issues involved in the action thus filed by plaintiff and cross-defendant; that said jury found in favor of said Dickinsons and against plaintiff company in the sum of Five Thousand Two Hundred Sixteen Dollars and Sixty-five Cents (\$5,216.65), with interest, and that such judgment in their behalf should have been entered by the Clerk of the Court forthwith, together with judgment in favor of the other defendants as found by the jury's verdict; that the findings and judgment as made and entered by the Court are contrary to the verdict of the jury and have no substantial basis in fact or law.

(h) That it affirmatively appears that defendant L. K. Fereva was the general agent of the plaintiff company, and that all his actions and conduct relative to giving notice of accidents were fully known, approved and acquiesced in by plaintiff company [109] in connection with giving notice of

loss in any accident in which he had any interest, and hence the plaintiff company was and is bound by his actions and conduct, and at least as to the defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, the verdict of the jury must be sustained and they are entitled to recover as against said plaintiff and cross-defendant the full amount of their claim due from defendant L. K. Fereva.

V.

Insufficiency of the evidence to justify the decision and judgment in that it is against law. As to this specification defendants and cross-claimants rely upon subdivisions a, b, c, d, e, f, g and h, as set forth in paragraph IV of this petition, and all of said subdivisions are made part of this paragraph as if here fully set forth in detail.

VI.

Errors in law occurring at the trial, and as grounds for same defendants and cross-claimants again rely on all of the grounds set forth in subdivisions a, b, c, d, e, f, g and h of paragraph IV herein, and all of said subdivisions are made part of this paragraph as if here fully set forth in detail. [110]

Defendants and cross-claimants, in addition to relying upon all of the foregoing grounds as hereinabove set forth, base this petition and motion for new trial further upon all of the pleadings, proceedings, papers and briefs now on file, and upon

the minutes of the Court and the testimony taken and adduced upon the trial of said cause, including the transcript of the reporter's shorthand notes.

Dated: October 14, 1942.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
EMMETT SEAWELL,

Attorneys for defendants and cross-claimants
Charles Gromer Dickinson and Doris May Dickinson, husband and wife.

MILTON M. HOGLE,
Attorney for L. K. Fereva, individually, and doing business under the firm name and style of "Fereva Chevrolet Company", defendant.

ERLING S. NORBY,
Attorney for defendant William Kemp.

[Endorsed]: Filed Oct. 15, 1942. [111]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco on Tuesday the 23rd day of February, in the year of our Lord one thousand nine hundred and 43.

Present: The Honorable Martin I. Welsh, District Judge.

[Title of Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The motion for a new trial having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion for a new trial be and the same is hereby Denied. [112]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles Gromer Dickinson and Doris May Dickinson, his wife, William Kemp and L. K. Fereva, individually and doing business under the firm name and style of "Fereva Chevrolet Company," defendants above named, and [113] Charles Gromer Dickinson and Doris May Dickinson, husband and wife, Cross-claimants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled action on the 9th day of October, 1942, in favor of plaintiff and against said defendants and cross-claimants, and from the whole of said judgment, and also hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order duly made in the above entitled court and case on February 23, 1943, denying the petition and motion for a new trial of defendants and cross-claimants above named.

Dated: May 20, 1943.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,

Attorneys for defendants and cross-claimants
Charles Gromer Dickinson and Doris May
Dickinson, husband and wife.

MILTON M. HOGLE,

Attorney for L. K. Fereva, individually, and doing
business under the firm name and style of
"Fereva Chevrolet Company," defendant.

ERLING S. NORBY,

Attorney for defendant William Kemp.

[Endorsed]: Filed May 21, 1943. [114]

BOND ON APPEAL

Know All Men by These Presents,

That we, J. Oscar Goldstein, as principal and R. M. Macy as sureties, are held and firmly bound unto General Accident Fire and Life Assurance Corporation, Ltd., a corporation in the full and just sum of Two hundred fifty and no/100 (\$250.00) dollars, to be paid to the said General Accident Fire and Life Assurance Corporation, Ltd., a corporation certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of

July, in the year of our Lord One Thousand Nine Hundred and forty-three.

Whereas, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between General Accident Fire and Life Assurance Corporation, Ltd., a corporation, Plaintiff and Cross-Defendant, vs. Charles Gromer Dickinson, Doris May Dickinson, William Kemp, and L. K. Fereva, individually, and doing business under the firm name and style of Fereva Chevrolet Company, Defendants and Cross-Claimants a judgment was rendered against the said Defendants and Cross-Claimants and the said General Accident Fire and Life Assurance Corporation, Ltd., a corporation having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Defendants and Cross-Claimants shall prosecute said appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full [115] such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if they fail to make their plea good, then the above

obligation to be void; else to remain in full force and virtue.

[Seal] J. OSCAR GOLDSTEIN.

[Seal] R. M. MACY.

Acknowledged before me the day and year first above written.

[Seal] J. R. ROBINSON,

Notary Public in and for the County of Butte,
State of California.

United States of America,
Northern District of California—ss.

J. Oscar Goldstein and R. M. Macy, being duly sworn, each for himself deposes and says, that he is a freeholder in said District, and is worth the sum of Five hundred and no/100 Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

J. OSCAR GOLDSTEIN,

R. M. MACY.

Subscribed and sworn to before me this 7th day of July A.D. 1943.

[Seal] J. R. ROBINSON,

Notary Public in and for the County of Butte, State of California.

[Endorsed]: Filed Jul. 8, 1943. [116]

[Title of District Court and Cause.]

DESIGNATION OF MATTERS TO BE
INCLUDED IN RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Charles Gromer Dickinson and Doris May Dickinson, husband and wife, William Kempt and L. K. Fereva, individually, and do- [117] ing business under the firm name and style of "Fereva Chevrolet Company," defendants above named, and Charles Gromer Dickinson and Doris May Dickinson, husband and wife, cross-claimants above named, by their undersigned attorneys, hereby designate for inclusion in the transcript of record on appeal, all of the pleadings, records, proceedings and evidence with reference to the above entitled action in the above entitled court and case, which was duly tried in the above entitled court on the 8th, 11th, 22nd, 23rd, 26th and 29th days of December, 1941, excluding from said record, however, the exhibits which were offered and received in evidence, and which exhibits it is the intention of the appellants to have transmitted to the United States Circuit Court of Appeals for use and reference at the time said matter is to be heard and determined by said United States Circuit Court of Appeals.

Dated: May 20th, 1943.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,

Attorneys for defendants and cross-claimants
Charles Gromer Dickinson and Doris May Dick-
inson, husband and wife.

MILTON M. HOGLE,

Attorney for L. K. Fereva, individually, and do-
ing business under the firm name and style of
“Fereva Chevrolet Company,” defendant.

ERLING S. NORBY,

Attorney for defendant William Kemp.

[Endorsed]: Filed May 21, 1943. [118]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE
AND FILE TRANSCRIPT ON APPEAL

Upon motion of J. Oscar Goldstein and Burton J. Goldstein, Esqs., attorneys for defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife; Milton M. Hogle, Esq., attorney for L. K. Fereva, individually and dba “Fereva Chevrolet Company, defendants; and Erling S. Norby, Esq., attorney for defendant William Kemp, it is hereby ordered that the time for the preparation and filing of appellants’ transcript on appeal is hereby extend- [119]
ed to and including July 31, 1943.

Dated: June 25th, 1943.

MARTIN I. WELSH,

Judge of the District Court.

[Endorsed]: Filed June 28, 1943. [120]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 120 pages, numbered from 1 to 120, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of General Accident Fire and Life Assurance Corporation vs. Charles Gromer Dickinson, et al., No. 4287, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Matters to be included in Record on Appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Fourteen and 25/100 (\$14.25) Dollars, and that the same has been paid to me by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 23rd day of July, A. D. 1943.

[Seal]

C. W. CALBREATH,

Clerk.

By F. M. LAMPERT,

Deputy Clerk.

[Title of District Court and Cause.]

TESTIMONY

Monday, December 22, 1941

11:00 O'Clock A. M.

Before: Hon. Martin I. Welsh, Judge

(A jury having been heretofore, to-wit, on Monday, December 8, 1941, empaneled and sworn to try the cause, and continuances having been duly had, the above entitled action came on for trial on this date.)

The Clerk: General Accident versus Dickinson.

Mr. Scott: Ready.

Mr. Goldstein: Ready.

The Court: Call the roll of jurors.

(Roll called by the Clerk.)

The Clerk: They are all present, sir.

The Court: You may proceed.

Mr. Goldstein: May it please your Honor, in this case on trial I am not aware of whether your Honor has received the instructions that were left here for Judge Louderback, but I desire to withdraw that set and substitute this one, which will take its place (handing documents to the Clerk). I have two instructions which I have withdrawn, and I have re-numbered some of those, and I would like to file these instructions as being the instructions of Mr. and Mrs. Dickinson and Mr. Kemp.

Now, at this time I desire to ask leave of the Court to file an amendment to the answer of the Defendants Dickinson and Kemp. A copy of this amendment, your Honor, was served on counsel for

the insurance company on December 9th. It was my intention to file the amendment on the morning of the trial, and I served Mr. Scott, the attorney for the company, the day before. It is simply setting up a waiver and an estoppel of the filing or the giving of the written notice under the terms of the policy by the actions and conduct on the part of the company through its general agents, [2*] Wentz & Erlin. Mr. Scott was familiar with those facts for some length of time prior to the time of the case coming to trial, and it was no surprise to him, and in order to comply with the law I served a notice on Mr. Scott this amendment would be filed, and I respectfully ask leave of the Court to file this document, which is verified by one of the defendants.

The Court: Any objection?

Mr. Scott: No objection.

The Court: So ordered.

Mr. Goldstein: And also the notice of motion.

The Court: You may proceed, gentlemen.

(Thereupon Mr. Scott made an opening statement on behalf of the plaintiff, and Mr. Goldstein followed with an opening statement on behalf of the defendants.)

Mr. Scott: May it please your Honor, by the pleadings, certain facts are admitted, and may I, in opening our case, state those facts?

The Court: You may.

Mr. Scott: And I will ask counsel if I am correct as I state them.

Mr. Goldstein: No objection.

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Scott: In paragraph I it is alleged—and would it be proper to tell the jury that these facts, where they are admitted they are taken as basic facts in the case?

In paragraph I of the plaintiff's complaint it is alleged that the Plaintiff General Accident Fire and Life Assurance Corporation, Ltd., is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of Scotland, and at all times herein mentioned said corporation was and is now engaged in the business of insurance against loss [3] or damage, or anything out of liability; that said corporation is and was at all the times herein mentioned, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California, in the City and County of San Francisco.

The next paragraph is also admitted, that Defendants Charles Gromer Dickinson and Doris May Dickinson are citizens of the State of California, and reside in the City of Chico, County of Butte, in said State; that Defendant William Kemp is a citizen of the State of California, and resides in the Town of Yuba City, County of Sutter, said State; that Defendant L. K. Fereva is a citizen of the State of California, and resides in the City of Lincoln, County of Placer, said State.

The next sections are also admitted:

“3. That the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

“4. That this suit is brought under and pursuant to the Federal Declaratory Judgment Act,”——

citing it.

“5. That on or about the 6th day of December, 1939, plaintiff issued a policy of automobile insurance to Defendant L. K. Fereva; that the policy period was from December 16, 1939, to December 16, 1940, and said policy was in effect during all of said period; that in said policy plaintiff agreed with Defendant L. K. Fereva, individually, and doing business under the firm name and style of Fereva Chevrolet Company, to pay on behalf of said Defendant L. K. Fereva, subject to the limits of liability, exclusions, conditions, and other terms of said policy, all sums not exceeding \$7,500 for each person, [4] and not exceeding \$30,000 for each accident, which said Defendant L. K. Fereva should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury sustained by any person or persons caused by accident, and arising out of the ownership, maintenance, and use of a certain automobile covered by said policy of automobile insurance, to-wit, A Cadillac tow car, year 1924; that reference is hereby expressly made to said exhibit, and the same is hereby made a part hereof.”

Counsel, will you kindly produce the policy?

(Document handed to Mr. Scott.)

Mr. Scott: Might we digress from the admissions in the pleadings, your Honor, to offer in evidence policy of automobile insurance, No. AG 1556, issued to L. K. Fereva, DBA—that is, doing business as Fereva Chevrolet Co., expiring December 16, 1940?

Mr. Goldstein: No objection.

The Court: Admitted.

(The insurance policy referred to was marked Plaintiff's Exhibit No. 1 in evidence.)

PLAINTIFF'S EXHIBIT NO. 1

National Standard Garage
Liability Policy

GA

Service That Excels

Established 1885

General Accident Fire and Life Assurance
Corporation, Limited
(A Stock Insurance Company)

United States Offices

Fourth and Walnut Streets
Philadelphia

Policy No. AG 1556

Issued to

L. K. Fereva, d.b.a. Fereva Chevrolet Co.
Expires December 16th, 1940

IMPORTANT

Please Read Your Policy

Plaintiff's Exhibit No. 1—(Continued)

GENERAL ACCIDENT
FIRE AND LIFE
ASSURANCE CORPORATION, LIMITED

Declarations

Item 1. Name of insured L. K. Fereva doing business as Fereva Chevrolet Co.

Address Lincoln, Placer County, California
(No., street, town, county, state)

Location of insured premises (Enter "same" if same location as above address.) Same

The named insured is (individual, corporation or partnership) Individual

Item 2. Policy Period: From December 16, 1939 to December 16, 1940 12.01 a. m., standard time at the address of the named insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages and divisions thereunder as are indicated by specific premium charge or charges. The limit of the corporation's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto.

Plaintiff's Exhibit No. 1—(Continued)

Operations	Coverages	Limits of Liability	Estimated Total Remuneration	Rates per \$100	Estimated Advance Premiums
Division 1					Minimum
Automobile Dealer or Automobile Repair Shop	<div> <div> Bodily A. Injury Liability </div> <div> \$ 7500.00 each person \$30000.00 each accident </div> </div>		\$5000.00	1.64	\$101.20
	<div> <div>Property B. Damage Liability</div> <div> \$ 5000.00 each accident </div> </div>			.35	\$ 25.00
Division 2					
Automobile Storage Garage or Automobile Service Station	<div> <div> Bodily A. Injury Liability </div> <div> \$ each person \$ each accident </div> </div>				\$ none
	<div> <div>Property B. Damage Liability</div> <div> \$ each accident </div> </div>				\$ none
	Endorsement attached D. O. C.				Lia. \$ 1.72
	Endorsement attached				P.D. \$.50
					\$ none
Minimum Premiums Division 1 or 2	Coverage A \$101.20	Coverage B \$ 25.00	Total Estimated Advance Premium for Policy		\$128.42

Plaintiff's Exhibit No. 1—(Continued)

Item 4. The named insured is conducting no other business operations at this or any other location not herein designated, except as herein stated: Auto Sales & Service & Garage

Item 5. No insurer has canceled any similar insurance issued to the named insured during the past year, except as herein stated: No Exceptions

Date and place of issue 12/6/39, S.F., Cal.

Renewal of policy number AG-991262

Countersigned by WENTZ & ERLIN

By GEO. D. KEIL.

General Accident Fire and Life Assurance
Corporation, Limited
Of Perth, Scotland

(A Stock Insurance Company, Herein Called
the Corporation)

Does Hereby Agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

Insuring Agreements

I. Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages,

Plaintiff's Exhibit No. 1—(Continued)

including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of such of the operations hereinafter defined as are indicated by specific premium charge or charges in item 3 of the declarations.

Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of such of the operations hereinafter defined as are indicated by specific premium charge or charges in item 3 of the declarations.

Definition of Operations

Division 1. Automobile Dealer or Automobile Repair Shop. The ownership, maintenance, occupation or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile dealer or automobile repair shop, and all operations either on the premises or elsewhere which are necessary and incidental thereto, including repairs of automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the ownership, maintenance or use of any automobile for any purpose in connection with the above defined operations, and also for pleasure use.

Plaintiff's Exhibit No. 1—(Continued)

Division 2. Automobile Storage Garage or Automobile Service Station. The ownership, maintenance, occupation or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile storage garage or automobile service station, and all operations either on the premises or elsewhere which are necessary and incidental thereto, including ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the use of any automobile for any purpose in connection with the above defined operations.

II. Defense, Settlement, Supplementary Payments. It is further agreed that as respects insurance afforded by this policy the corporation shall

(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the corporation shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the corporation;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the corporation,

Plaintiff's Exhibit No. 1—(Continued)

all interest accruing after entry of judgment until the corporation has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the corporation's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The corporation agrees to pay the amounts incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

III. Definition of "Insured". The unqualified word "insured" wherever used includes not only the named insured but also any partner thereof, if the named insured is a partnership, or any executive officer thereof, if the named insured is a corporation, provided such partner or officer is active in the declared operations. The provisions of this paragraph do not apply:

(a) to any partner of the named insured with respect to bodily injury to or death of any partner thereof;

(b) to any executive officer of the named insured with respect to any action brought against such officer because of bodily injury to or death of another employee of the named insured injured in the course of such employment;

(c) to any executive officer with respect to any automobile owned by such officer or by any other

Plaintiff's Exhibit No. 1—(Continued)
executive officer of the named insured or by a member of the family of any such person.

IV. Policy Period, Territory. This policy applies only to accidents which occur during the policy period within the United States of America, Canada or Newfoundland.

Exclusions

This policy does not apply:

(a) to any automobile while used for carrying persons or property of others for a charge or while rented under contract or leased;

(b) under division 1 of the Definition of Operations, to any automobile owned or hired by the insured and used as a haulaway for the conveyance of automobiles or used for the wholesale or retail delivery of fuel oil or the wholesale delivery of gasoline; or to the ownership, maintenance or use for pleasure purposes of any automobile not owned by or in charge of the named insured for use principally in such operations;

(c) under division 2 of the Definition of Operations, (1) to any automobile owned, hired or registered by the named insured or by a partner thereof if the named insured is a partnership; (2) to the possession, consumption or use, elsewhere than upon the premises herein designated of any article manufactured, sold or distributed by the insured;

(d) to such injury or destruction caused by the ownership, maintenance or use of (1) any elevator, its car, platform, shaft, hoistway or appliances; (2)

Plaintiff's Exhibit No. 1—(Continued)

any mechanical or hydraulic hoist for raising or lowering automobiles or other materials from one floor, balcony, or platform to another; (3) any air or water craft; or caused by making additions to, structural alterations in, or the construction or demolition in whole or in part of any building, structure, elevator, mechanical or hydraulic hoist;

(e) to such injury or destruction caused by any person under the age of fourteen years, or by any person employed by the insured in violation of any state, federal or provincial law as to age, or with respect to any automobile while being operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation, or by any person in any prearranged race or competitive speed test;

(f) to liability assumed by the insured under any contract or agreement;

(g) to any partner, if the named insured is a partnership, with respect to any automobile owned by such partner or by any other partner of the named insured or by a member of the family of any such person; or, if the named insured is an individual, to any automobile owned by a member of the named insured's family;

(h) under coverage A, to bodily injury to or death of any employee of the insured while engaged in the business of the insured, or to any obligation for which the insured may be held liable under any workmen's compensation law;

Plaintiff's Exhibit No. 1—(Continued)

(i) under coverage A, to bodily injury to or death of any person from an accident while such person is in any automobile of the commercial or truck type, the use of which is insured by this policy, if more than eight persons are then in the automobile and it is being used for purposes other than the business of the named insured;

(j) under coverage B, to property owned by, rented to, leased to, in charge of, or transported by the insured.

Conditions

(The conditions, except condition 4, apply to all coverages. Condition 4 applies only to coverage A)

1. Premium. The premiums are based (a) on the entire remuneration earned during the policy period by all employees of the named insured engaged in the declared operations, except as hereinafter stated, and (b) on the remuneration earned during the policy period by the proprietor or proprietors, if the named insured is an individual or partnership, or by any executive officer, if the named insured is a corporation, and by salesmen and general managers on the basis of a fixed amount of \$2,000 per annum for each proprietor or executive officer active in such operations and for each salesman and each general manager.

Upon termination of this policy, the amount of the remuneration earned by proprietors, executive officers and all employees, during the policy period, shall be exhibited to the corporation and the earned

Plaintiff's Exhibit No. 1—(Continued)

premiums computed at the rates and under the terms of this policy. If the earned premiums thus computed are greater than the advance premiums paid, the named insured shall pay the additional amount to the corporation; if less, the corporation shall return to the named insured the unearned portion but, except in event of cancelation, the corporation shall retain the minimum premiums stated in this policy.

2. Inspection. The corporation shall be permitted to inspect the insured premises and to examine the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of this policy, as far as they relate to the premium basis of this policy.

3. Automobile Defined. Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean a motor vehicle, trailer or semitrailer of any type; and the word "trailer" shall include semitrailer. The terms of this policy shall apply separately to each automobile insured hereunder but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

4. Limits of Liability. Coverage A. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the cor-

Plaintiff's Exhibit No. 1—(Continued)

poration's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the corporation's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

5. Limits of Liability. The inclusion herein of more than one insured shall not operate to increase the limits of the corporation's liability.

6. Financial Responsibility Laws. Such insurance as is afforded by this policy for bodily injury liability or property damage liability with respect to any automobile owned by the named insured shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of such automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the corporation for any payment made by the corporation which it would not have been obligated to make under the terms of

Plaintiff's Exhibit No. 1—(Continued)

this policy except for the agreement contained in this paragraph.

7. Notice of Accident—Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses. If claim is made or suit is brought against the insured, the insured shall immediately forward to the corporation every demand, notice, summons or other process received by him or his representative.

8. Assistance and Cooperation of the Insured. The insured shall cooperate with the corporation and, upon the corporation's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits; and the corporation shall reimburse the insured for expenses, other than loss of earnings, incurred at the corporation's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

Plaintiff's Exhibit No. 1—(Continued)

9. **Action Against Corporation.** No action shall lie against the corporation unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the corporation.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the corporation as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the corporation of any of its obligations hereunder.

10. **Other Insurance.** If the insured has other insurance against a loss covered by this policy the corporation shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

11. **Subrogation.** In the event of any payment under this policy the corporation shall be subrogated

Plaintiff's Exhibit No. 1—(Continued)

to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

12. Changes. No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the corporation from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the United States Manager.

13. Assignment. No assignment of interest under this policy shall bind the corporation until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the corporation within thirty days after the date of such death or adjudication, cover the named insured's legal representative as the named insured.

14. Cancellation. This policy may be canceled by the named insured by mailing written notice to the corporation stating when thereafter such cancellation shall be effective. This policy may be canceled by the corporation by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and

Plaintiff's Exhibit No. 1—(Continued)

the insurance under this policy as aforesaid shall end on the effective date and hour of cancelation stated in the notice. Delivery of such written notice either by the named insured or by the corporation shall be equivalent to mailing. The corporation's check or the check of its representative similarly mailed or delivered shall be sufficient tender of any refund of premium due to the named insured.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table but such premiums shall not be less than the short rate portion of the minimum premiums stated in the declarations. If the corporation cancels, earned premiums shall be computed pro rata. Remuneration for the policy period stated in the declarations shall be computed upon the basis of remuneration to the date of cancelation. Premium adjustment in accordance with the foregoing shall be made upon computation of the earned premiums.

15. **Declarations.** By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the corporation or any of its agents relating to this insurance.

In witness whereof, the General Accident Fire and Life Assurance Corporation, Limited, has

Plaintiff's Exhibit No. 1—(Continued)
caused this policy to be signed by its United States Manager at Philadelphia, Pa., and countersigned on the declarations page by a duly authorized agent of the corporation.

JAS. F. MITCHELL

United States Manager

ENDORSEMENT

Not Valid Unless Countersigned By a Duly Authorized Representative of the Corporation

December 16th, 1939

In Consideration of the Premium at which this policy is written it is understood and agreed that coverage under this policy does not apply to any automobile or automobiles already purchased; to be purchased and/or consigned to the insured, which may be driven under their own power or towed from any point outside the State of California to any location within the State of California.

Attached to and forming part of Policy No. AG-1556, issued by the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, to L. K. Fereva doing business as Fereva Chevrolet Co.

JAS. F. MITCHELL

United States Manager

Countersigned at San Francisco, Cal.

Date of Countersignature December 6th, 1939

(Not Effective Date of Endorsement)

WENTZ & ERLIN Agent.

By GEO. D. KEIL

Plaintiff's Exhibit No. 1—(Continued)

ENDORSEMENT

Not Valid Unless Countersigned By a Duly Authorized Representative of the Corporation

Drive Other Private Passenger
Automobiles—Limited Form

December 16th, 1939

In consideration of the payment of an additional premium included in the policy it is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability also applies subject to the following Provisions:

Divisional. To L. K. Fereva, with respect to his operation of or presence in any private passenger automobile, provided:

a. such use is "Pleasure and Business" as defined in the policy; and

b. such use is with the permission of any person having the right to grant such permission; and

c. the automobile is not (1) owned in full or in part by, or registered in the name of, or hired by L. K. Fereva or any member of his household, or (2) furnished L. K. Fereva for his regular use by his employer or by any other person or organization; and

d. the insurance afforded under this division shall be excess insurance over any other valid and collectible insurance available to L. K. Fereva, either as an insured under a policy

Plaintiff's Exhibit No. 1—(Continued)
applicable with respect to the automobile or otherwise, against a loss covered under this division.

This endorsement becomes effective at 12:01 A.M. Standard Time, December 16, 1939. Subject, otherwise, however, to the limits of liability, exclusions, conditions and other terms of this policy.

Attached to and forming part of Policy No. AG-1556, issued by the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, to L. K. Fereva, d.b.a. Fereva Chevrolet Co.

JAS. F. MITCHELL

United States Manager

Countersigned at San Francisco, Cal.

Date of Countersignature December 6th, 1939

(Not Effective Date of Endorsement)

WENTZ & ERLIN Agent.

By GEO. D. KEIL

ENDORSEMENT

Not Valid Unless Countersigned By a Duly Authorized Representative of the Corporation

Drive Other Cars—Private Passenger Automobiles
Limited Form—Relatives

December 16th, 1939

In consideration of the payment of an additional premium included in policy it is agreed that such insurance as is afforded by the policy for Bodily

Plaintiff's Exhibit No. 1—(Continued)

Injury Liability and for Property Damage Liability also applies subject to the following provisions:

To Bessie K. Fereva as an insured, if a relative of and a resident in the household of L. K. Fereva with respect to such relative's operation of or presence in any private passenger automobile, provided:

(a) such use is personal, pleasure and business use; and

(b) such use is with the permission of any person having the right to grant such permission, and

(c) the automobile is not (1) owned in full or in part by, or registered in the name of, or hired by the named insured or by such relative or any member of the household of L. K. Fereva, or (2) furnished such relative for his regular use by his employer or by any other person or organization; and

(d) the insurance afforded under this endorsement shall be excess insurance over any other valid and collectible insurance available to such relative, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under this division.

This endorsement becomes effective at 12:01 A.M. Standard Time December 16th, 1939. Subject, otherwise, however, to the limits of liability, exclusions, conditions and other terms of this policy.

Attached to and forming part of Policy No. AG-1556, issued by the General Accident Fire and

Plaintiff's Exhibit No. 1—(Continued)

Life Assurance Corporation, Ltd., of Perth, Scotland, to L. K. Fereva, d.b.a. Fereva Chevrolet Co.

JAS. F. MITCHELL

United States Manager

Countersigned at San Francisco, Cal.

Date of Countersignature December 6th, 1939

(Not Effective Date of Endorsement)

WENTZ & ERLIN Agent.

By GEO. D. KEIL

SHORT RATE TABLE

	Percentage of Annual Prem.
1 day	2
2 days.....	4
3 "	5
4 "	6
5 "	7
6 "	8
7 "	9
8 "	9
9 "	10
10 "	10
11 "	11
12 "	12
13 "	13
14 "	13
15 "	14
16 "	14
17 "	15
18 "	16
19 "	16
20 "	17
25 "	19
30 "	20
35 "	23

Plaintiff's Exhibit No. 1—(Continued)

		Percentage of Annual Prem.
40	" ..	26
45	" ..	27
50	" ..	28
55	" ..	29
60	" ..	30
65	" ..	33
70	" ..	36
75	" ..	37
80	" ..	38
85	" ..	39
90	" (three months)	40
105	" ..	45
120	" (four months)	50
135	" ..	55
150	" (five months)	60
165	" ..	65
180	" (six months)	70
195	" ..	73
210	" (seven months)	75
225	" ..	78
240	" (eight months)	80
255	" ..	83
270	" (nine months)	85
285	" ..	88
300	" (ten months)	90
315	" ..	93
330	" (eleven months)	95
360	" (twelve months)	100

[Endorsed]: Filed Dec. 22, 1941.

Mr. Scott: I think it might save time if I read to the jury certain portions of the policy—or does your Honor desire to have this all read? It is somewhat lengthy.

Mr. Goldstein: Wouldn't it be advisable to have

the stipulated facts in first? In other words, go right through the complaint?

Mr. Scott: I think that probably would be ship-shape. We will proceed, then, with the further admissions in the complaint.

Paragraph VI. This portion of paragraph VI is admitted: [5]

“That on the 25th day of February, 1940, at the hour of approximately 6:15 o'clock a. m. of said day, an accident occurred on U. S. Highway 99-E, between the cities of Roseville and Lincoln, Placer County, California, at a point approximately two miles south of the City of Lincoln; that at that time and place Defendant L. K. Fereva controlled and was using upon the shoulder of said U. S. Highway 99-E, the automobile tow truck covered by said policy of insurance; that in said accident Defendants Charles Gromer Dickinson, Doris May Dickinson and William Kemp received and sustained certain injuries to person and property.”

The remaining portion of the paragraph is denied.

Mr. Goldstein: Denied.

Mr. Scott: The next fact admitted is that contained in paragraph VII:

“That on or about the 12th day of April, 1940, Defendants Doris May Dickinson and Charles Gromer Dickinson commenced an action for damages against Defendant L. K. Fe-

reva in the Superior Court of the State of California, in and for the County of Placer, entitled, 'Doris May Dickinson and Charles Gromer Dickinson, husband and wife, Plaintiffs, versus L. K. Fereva, doing business under the firm name and style of "Fereva Chevrolet Co.," Richard Roe Company, a corporation, Henry Roe Company, a copartnership, John Doe I, John Doe II, and John Doe III, Defendants,' and numbered therein 11844; that a true copy of the complaint in said action is attached hereto and marked Exhibit B; that specific reference is hereby made to said Exhibit B, and the same is hereby made a part [6] hereof."

May it be stipulated that the Exhibit B attached to the complaint be deemed in evidence?

Mr. Goldstein: We have no objection, and it may be considered for all purposes as Plaintiff's Exhibit No. 2.

Mr Scott: Yes.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 2.)

Mr. Scott: The following paragraph is admitted:

"That on or about the 30th day of November, 1940, Defendant William Kemp commenced an action for damages against Defendant L. K. Fereva, in the Superior Court of the State of California, in and for the County of Butte, entitled, 'William Kemp, Plaintiff, versus K. L. Fereva, individually, and

doing business under the firm name and style of Fereva Chevrolet Company, Charles Dickinson, First Doe, Second Doe, and Third Doe, a corporation, Defendants,' and numbered therein 18256; that a true copy of the complaint in said action is attached hereto and marked Exhibit C; that specific reference is hereby made to said Exhibit C, and the same is hereby made a part hereof."

The same stipulation?

Mr. Goldstein: The same stipulation: the complaint in the Kemp case may be considered as Plaintiff's Exhibit No. 3.

(The document referred to was marked Plaintiff's Exhibit No. 3 in evidence.)

Mr. Scott (reading): "That said action so brought in the County of Placer by said Doris May Dickinson and Charles Gromer Dickinson came on regularly for trial before the [7] Court sitting with a jury; that thereafter, and on or about the 6th day of December, 1940, judgment was duly given, made and entered on the verdict of said jury in favor of said Doris May Dickinson and Charles Gromer Dickinson, the plaintiffs therein, and against said L. K. Fereva, doing business under the firm name and style of Fereva Chevrolet Co., defendant, in the sum of \$5.000, and costs of suit."

Mr. Goldstein: Pardon me.

If the Court please, in order to save time and obviate the necessity of my referring to the cross-complaint. I would like to have Mr. Scott stipu-

late in reference to that paragraph that the judgment was actually entered for \$5,000 principal and \$265.65 costs, and that will take care of this paragraph and have an admission as to the factual situation regarding that judgment.

Mr. Scott: What did you say the cost item was?

Mr. Goldstein: \$265.65.

Mr. Scott: May I ask, Mr. Goldstein, is that the correct amount?

Mr. Goldstein: That is the correct amount.

Mr. Scott: I will accept that amendment to the stipulation. Then there is this further admission:

“That the said action brought in the County of Butte by said Defendant William Kemp, plaintiff therein, against said Defendant L. K. Fereva, in which said William Kemp seeks damages in the sum of \$7,905, and his costs of suit, is still pending therein, and has not yet been brought to trial.”

Mr. Goldstein: So stipulated.

Mr. Scott: Paragraph XI. May I call it to your Honor's attention, if it is convenient? [8]

The Court: Yes.

Mr. Scott: Paragraph XI seems to me to rather embody merely a statement of legal controversy between us, which would hardly be—although it is admitted by the defendants to be correct, it hardly comes within the scope of factual matters which may go in, but may I reserve any comment on that? At present I think it is improper as a statement of fact. The same would be true as to XII, the portion thereof which has not been denied.

Mr. Goldstein: As I understand, if the Court please, paragraphs XI, XII, and XIII, pertain to certain conclusions from the foregoing facts, so I think it is a matter to be argued before the jury on the facts presented.

Mr. Scott: Yes.

The Court: Well, Mr. Scott reserved the right to do that.

Mr. Scott: I sometimes must admit my pleadings do not look exactly factual when they do get to the test of the trial.

May I now state in general the terms of the policy with the General Accident?

The Court: Yes.

Mr. Scott: This policy introduced in evidence now and marked Exhibit I contains the following salient features—we reserve the right, if necessary, to read the remainder, your Honor—by which the General Accident Fire and Life Assurance Corporation insures L. K. Fereva, doing business as Fereva Chevrolet Co., address Lincoln, Placer County, California, the insured named is an individual; the policy period is from December 16, 1939, to December 16, 1940. The coverage: Division 1, Operations, automobile dealer or automobile repair shop. Coverage A, bodily injury liability, \$7,500 for each person, \$30,000 for each accident. Estimated total remuneration, \$5,000. Rate, \$1.64. [9] Estimated advance premiums, \$101.20. Property damage liability under Coverage B, \$5,000 for each accident, minimum premium \$25.00.

It is declared that the named insured is conduct-

ing no other business operations at this or any other location not herein designated, except as herein stated: Auto sales and service garage.

Attached to the policy are two endorsements, dated December 16, 1939, neither of which particularly affect the issues in this case.

Mr. Goldstein: Have no bearing upon the issues.

Mr. Scott: Have no bearing upon the issues.

The insuring provisions of the policy contain the following:

“General Accident Fire and Life Assurance Corporation does hereby agree with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the limits of liability, exclusions, conditions, and other terms of this policy”——

Then follow the insuring agreements: Coverage A, against bodily injury liability, and B, against property damage; the exclusions, which are not relevant here, and the conditions, among which, Condition 7 reads as follows:

“7. Notice of accident, claim or suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation, or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured, and also reasonably obtainable information respecting the time, place, and cir-

cumstances of the accident, the names and addresses of the injured, and of [10] available witnesses. If claim is made or suit is brought against the insured, the insured shall immediately forward to the corporation every demand, notice, summons, or other process received by him or his representative."

The Court: It is twelve o'clock. Ladies and gentlemen of the jury, we will not recess until two o'clock this afternoon. Before doing so the Court admonishes you, and each of you, not to discuss or converse with each other or anyone else on any point or any fact connected with the case, and that you are not to form or express an opinion thereon until the case is finally submitted to you.

Will counsel stipulate that instead of repeating the admonition verbatim in the future, I may refer to the admonition heretofore given?

Mr. Scott: So stipulated.

Mr. Goldstein: So stipulated.

The Court: The witnesses will be instructed to return here at two o'clock without further order of the Court.

(Thereupon a recess was taken until 2:00 o'clock p. m.) [11]

The Court: You may proceed.

Mr. Scott: Condition 12 of the policy reads as follows: "Changes. No notice to any agent, or knowledge possessed by any agent or by any other

person shall be held to effect a waiver or change in any part of this policy"—

The Court: Do you ladies and gentlemen hear Mr. Scott plainly?

A Juror: Not very well.

The Court: I suggest you stand up by the witness chair.

Mr. Scott: I am sorry, but I don't speak as well as I used to.

"To notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy, nor estop the corporation from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the United States Manager."

The policy, on the face of it, is marked "Counter-signed by Wentz & Erlin, by George Klein"—

Mr. Goldstein: By whom, Mr. Scott?

Mr. Scott: Klein—K-l-e-i-n.

Mr. Goldstein: George Keil, isn't it? [12]

Mr. Scott: Keil—K-e-i-l; pardon me.

And each of the endorsements—there are three of them—is countersigned "Wentz & Erlin, Agent, by George Keil," and it will be noted that there is not on the back of the policy, or anywhere else upon the policy, any reference whatever to Mr. Urquhart, either by label, endorsement, or otherwise.

Mr. Goldstein: Well, we concede that, your

Honor. We stipulate that Mr. Urquhart's name does not appear on the policy, any portion of it.

Mr. Scott: Mr. Fereva, will you take the stand, please?

LEON KARL FEREVA,

Called for the Plaintiff under Section 2055, C. C. P.; Sworn.

The Clerk: Q. Will you please state your full name to the Court and jury?

A. Leon Karl Fereva.

Mr. Scott: Your Honor, we are calling the defendant under Section 2055 of the Code of Civil Procedure of the State of California. And may I explain the reason for that to the jury, your Honor?

The Court: You may.

Mr. Goldstein: If the Court please, I am going to object. All that he can say is that he called him under Section 2055, and he is the same as under cross examination. That is one of the provisions of law pertaining to a witness. That is the only thing he can say. That is exactly what he did—he called Mr. Fereva as an adverse witness.

The Court: I think that is sufficient.

Mr. Scott: It is. If your Honor pleases, that is what I intended to tell the jury. I thank counsel for telling them for me. [13]

(Testimony of Leon Karl Fereva.)

Direct Examination

By Mr. Scott:

Q. Your name, please?

A. Leon Karl Fereva.

Q. Where do you live?

A. In Lincoln.

Q. What county? A. Placer County.

Q. What is your occupation?

A. I have none at present.

Q. What was your occupation?

A. Automobile dealer.

Q. And where did you conduct your business?

A. In Lincoln, Placer County.

Q. For how long?

A. A little over 14 years.

Q. And in connection with that business did you carry on any other occupation?

A. Why, a little ranching on the side, and insurance; that is about all.

Q. You have sold automobiles?

A. Yes, sir.

Q. Had a garage, repair shop?

A. Yes, sir.

Q. And operated a tow car? A. Yes, sir.

Q. Now, Mr. Fereva, you were the insured under this policy of insurance that has been introduced in evidence, were you not? A. Yes, sir.

Q. And that policy of insurance was a renewal of previous policies? A. Yes, sir.

Q. For how many years, do you recall?

(Testimony of Leon Karl Fereva.)

A. Well, it ran from either 1928 or 1929 until 1940.

Q. In addition to your garage business, I assume you bought and sold automobiles?

A. Many.

Q. And did you also act as a soliciting agent for insurance company, or companies?

A. I did.

Mr. Goldstein: If the Court please, I am going to object to the question on the ground that it is too broad, and furthermore it is not a proper question to be put to the witness, because [14] nothing appears that he knows what a soliciting agent is. You can ask him what he did, what his duties were, but to ask him that question is improper, and I am going to object to it. In other words, this witness is an adverse witness to us also, as far as we are concerned. He can't ask him if he is a soliciting agent.

The Court: Reframe your question.

Mr. Scott: Q. Were you licensed as such by the State of California? A. Yes, sir.

Q. Have you the license here?

Mr. Goldstein: I will give you a certified copy of it.

Mr. Scott: Will you, please?

Mr. Goldstein: A certified copy of it (handing document to Mr. Scott).

Mr. Scott: Q. I show you a policy produced by Mr. Goldstein—rather, an agent's license produced by Mr. Goldstein, and certified. May I ask

(Testimony of Leon Karl Fereva.)

you whether that license was issued to you, the original of it? A. Yes, sir.

Mr. Scott: We offer this license, if your Honor pleases, in evidence.

Mr. Goldstein: No objection.

The Court: Admitted.

Mr. Scott: Together with the certificate of the Division of Insurance attached thereto.

Mr. Goldstein: No objection.

(The documents referred to were marked Plaintiff's Exhibit No. 4.)

Mr. Scott: Might I read it, if your Honor pleases?

The Court: You may.

Mr. Scott (reading: "State of California Insurance Agent's License. Expires July 1, 1940. Copy. [15]

"This is to certify that L. K. Fereva, whose principal office is located at (City or Town) Lincoln, County of Placer, California.

"Having complied with the requirements of the law, is hereby licensed as an insurance agent to solicit, negotiate, or effect contracts of insurance (except life and interinsurance) on behalf of insurers who have filed with the Commissioner an appointment of said licensee as their agent. Such transaction may be had only by and through the following designated persons: L. K. Fereva.

"Witness my hand and seal of office at San

(Testimony of Leon Karl Fereva.)

Francisco, the day and year written. A. Caminetti, Jr., Insurance Commissioner.

“This license shall remain in full force until July 1, 1940, and is subject to revocation or suspension by the Insurance Commissioner in the manner provided by law.

“This license does not authorize any transaction of insurance except on behalf of insurers who have filed appointments as above stated.”

Then, in the margin:

“Please take note of the following:

“Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State: (A) Acting as agent for a nonadmitted insurer in the transaction of insurance business in this State.

(B) In any manner advertising a nonadmitted insurer in this State.

(C) In any other manner aiding a nonadmitted insurer to transact insurance business in this State.”

citing the section—I cannot read it, the print is so small—of [16] the California Insurance Code——

“An agent cannot receive commissions on business not placed with a company for which he is licensed unless he holds a broker’s license.”

citing the applicable section of the Insurance Code.

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: Mr. Scott, you did not read the date of that. That is the only thing——

Mr. Scott: Yes. The date is printed in red, "39" to "40", and the certificate accompanying it shows it was issued July 1, 1939, and expires July 1, 1940.

Q. Now, Mr. Fereva, did you, under that license, solicit any insurance for the General Accident Fire and Life Assurance Company?

A. Why, through my business, yes; through my contracts, I was writing on the contracts I was selling personally, they covered that insurance.

Q. You did not yourself issue or sign any contracts of insurance, did you? A. No, sir.

Q. And had no authority so to do?

Mr. Goldstein: Just a moment. If the Court please, I object to that on the ground it calls for a conclusion of the witness.

The Court: Yes.

Mr. Scott: An agent may testify to his own authority, if your Honor please.

Mr. Goldstein: I disagree with counsel, if your Honor please. That is his conclusion. There are other things which will indicate what his authority was. What he did and how he did it.

Mr. Scott: Nevertheless he is competent to testify as to whether or not he is authorized as an agent to do certain things.

The Court: Proceed.

Mr. Scott: Did your Honor rule? [17]

The Court: Yes.

Mr. Scott: I didn't hear the ruling.

(Testimony of Leon Karl Fereva.)

The Court: The objection is overruled.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

A. No, sir.

Mr. Scott: Q. You hadn't any blank policies or blank endorsements, or other stationery that would permit you to exercise such authority, is that not true?

The Court: Q. Do you understand the question, Mr. Fereva?

A. Why, forms, yes. If a man wanted a certain type of insurance, these forms were made out and mailed to the agents, yes.

Mr. Goldstein: I didn't hear the last part of the answer.

A. There were forms which, if a man desired property damage and public liability insurance, these forms were filled out and mailed in.

Mr. Scott: These forms were applications?

The Witness: Yes, sir.

Mr. Scott: Q. Upon the filling out of these applications—they would be filled out and given to you and sent by you to the agents, is that correct?

A. Sent by me for the customer.

Q. That was the manner in which you carried on such business that you did for the General Accident Fire and Life Assurance Company?

A. Yes, sir.

Q. That was likewise true, was it not, with ref-

(Testimony of Leon Karl Fereva.)

erence to writing or getting business for the Merchants Fire and the Merchants Auto, is that correct? A. Yes, sir.

Mr. Goldstein: And the Potomac is the other.

Mr. Scott: I was hunting for the Potomac.

Q. And likewise true with reference to the Potomac, is that correct? [18]

A. Yes, sir.

Q. The policies of the General Accident Fire and Life Assurance Corporation were all, as a matter of custom, issued out of the office of Wentz & Erlin in San Francisco, is that not correct?

A. Yes, sir.

Q. Now, while this renewed policy was in effect you had an accident, did you not, in connection with the use of your tow car? A. Yes, sir.

Q. And that happened on February 25 of 1940?

A. Yes, sir.

Q. Early in the morning?

A. Well, near daylight, yes.

Q. Now, you had with you at the time one of your men named Campbell?

A. Yes, my shop foreman.

Q. Your shop foreman. And in this accident a Mr. and Mrs. Charles Gromer Dickinson sustained certain injuries, did they not? A. They did.

Q. And at the same time a Mr. Kemp, one of the defendants herein, sustained other injuries, is that correct? A. Yes, sir.

Q. And following the accident you and Mr.

(Testimony of Leon Karl Fereva.)

Campbell took the injured people, did you not, for medical treatment? A. Yes, sir.

Q. Will you tell me who took who?

A. Why, I took Mr. Kemp to Doctor McCarthy, and Mr. Campbell took Mr. and Mrs. Dickinson to Doctor Dubin.

Q. Now, sometime subsequent to that, in the month of April following, a summons and complaint—the month of April, 1940, a summons and complaint were served upon you in an action entitled Doris May Dickinson and Charles Gromer Dickinson against L. K. Fereva, et al.?

A. Yes, sir.

Q. And I show you what purports to be a copy of that summons and complaint and ask you if that is the copy that was served upon you, [19] as far as you recall? A. Yes, sir, it appears to be.

Mr. Scott: Counsel, might I suggest that this is the copy from which I made the copy which is now in evidence?

Mr. Goldstein: Yes. Just have that marked Exhibit No. 2. It is Exhibit No. 2. It was stipulated this morning that could be introduced as Exhibit No. 2, so you can mark that Exhibit 2.

(The summons and complaint referred to was marked Plaintiff's Exhibit No. 2.)

Mr. Scott: Q. Upon receipt of the summons and complaint what did you forthwith do with it?

A. Why, as near as my recollection, I came to Sacramento, took the matter up with Mr. Urquhart, and he in turn either turned me over to Mr. Hen-

(Testimony of Leon Karl Fereva.)

retty or went over to Mr. Henretty's office with me.

Q. Now, the Mr. Urquhart whom you refer to is the—is he Mr. R. F. Urquhart? A. Yes, sir.

Q. And the Mr. Henretty whom you refer to is Mr. Walter Henretty? A. Yes, sir.

Q. Now, when you went to Mr. Henretty's office——. Might I ask you, did you sign this automobile accident notice (exhibiting to witness)? Before you answer it—pardon me, Mr. Goldstein——

A. Yes, this is my signature.

Mr. Goldstein: If you signed it I have no objection at all. I don't care to see it. Entirely satisfied to have it offered in evidence.

Mr. Scott: We offer it in evidence, if your Honor pleases, and ask it take the exhibit number next in order.

The Court: Admitted.

(The accident notice was marked Plaintiff's Exhibit No. 5.)

AUTOMOBILE ACCIDENT NOTICE

Policy No. AG-1556

Name of Assured L. K. Fereva dba Fereva Chevrolet Co.

Business Address of Assured Lincoln, Cal.

Telephone No. 64

Home Address of Assured (If Individual)

Telephone No.

Make of Automobile Cadillao

H. P.

Year 1924

Mfr's No. ?

Type Tow car

Motor No. ?

Date of Accident February 25, 1940

at 6:45

o'clock

A. M.

Date of payment of last premium

day of

19

Name of Injured Chas. G. Dickinson, Doris M. Dickinson, Unknown man,

Age and Color 25-30--white, Abt. 24--white, Abt. 25--white,

Full Address General Delivery, General Delivery, Unknown

Chico,

Chico,

Unknown

California.

California.

Nature of Injuries Dickinson: Cut on forehead about 1 1/2 inches long. Mrs. Dickinson: Probably bruised. Unknown man: Back or pelvic injuries, full extent unknown.

Where taken after accident The Dickinsons went home after first aid and unknown man was taken to hospital on Auburn

Owner of Property Damaged Charles G. Dickinson had a 1934 Chevrolet Sport sedan

Description of Property Damaged badly damaged, and a Packard 2-door sedan, '27 or '28, belonging to a man named Frazier was badly damaged.

Extent of Damage (approximate) Cable was attached from boom of tow car to Frazier Packard. Though tow car was not struck, the boom, winch and gas tank of tow car were pulled off when Chevrolet struck Packard.

Name of Party causing Damage Charles G. Dickinson Full Address General Delivery, Chico, Cal.

Car now at Fereva Chevrolet Co., Lincoln, Cal.

How long will it remain there?

Name Unknown man (above injured) Address Unknown.

Name Orville Campbell Address Fereva Chevrolet Co., Lincoln, Cal.

Name Address

Name Address

Date of Notice April 26, 1940

Signature of Assured

Branch Office File No.

Home Office File No.

(Testimony of Leon Karl Fereva.)

Statement of Person Driving Car at Time
of Accident

(This Information Must Be Given in Detail)

Tow car was not being driven, but was hooked to Packard preparatory to pulling Packard back on highway.

Name

Business AddressTelephone...City...State...

Home Address.....Telephone...City...State...

Driving Experience.....Age.....Licensed?.....

State under whose employ you were at the time of accident mentioned herein, and under whose employ you are

Exact place of accident On U.S. 99E about three
Street or Streets
miles south of Lincoln, Cal.

City State

If at night, what lights were lit? Flare out 300 feet from tow car, two red lights on tow car

Direction and speed of your automobile Stopped off east edge of pavement.

Direction and speed of other automobile or vehicle North—40 to 50 MPH.

Side of street on which each vehicle was at the time of the accident and distance from the nearest curb Both cars were off east edge of pavement.

(Testimony of Leon Karl Fereva.)

State about signals given by either party, blowing of horns, etc.....

Number of passengers and their names in your car
None.

Number of passengers and their names in other car
Mr. and Mrs. Dickinson and infant child.

Condition of the weather Cloudy, drizzling, day just breaking.

Kind of pavement and description of its condition
.....

Remarks, if any made, by people in either vehicle at time of accident, or immediately after the accident
.....

State whether or not assured's car was in good running order and under complete control of the chauffeur or driver Yes State under whose direction car was being driven at the time of the accident and where the car was going from and to Tow car was about to pull another car back onto road.

Give your honest opinion as to who was at fault
Charles G. Dickinson.

Who ordered you to operate the car on the trip on which the accident occurred? What orders were given to you at said time? If no orders were given to you, state fully why you had the car out Traffic Officer had asked that tow car go out to pull in car of drunken driver, who had gotten off the road.

(Testimony of Leon Karl Fereva.)

Exact description of accident This drunk's car was about 20 feet off east edge of pavement and tow car had hooked onto Packard and Orvell Campbell was working winch on tow car, which was completely off east edge of pavement, its nearest point to pavement being two or three feet. I was watching traffic. I had a red flashlight and a white one. I saw the Dickinson car approaching and was about 70 feet south of tow car frantically waving both flashlights. I had to jump out of way, and Dickinson car swerved to right, passing east of tow car and just grazing right leg of Campbell, knocking down this unknown man who was talking to Campbell, and crashing into right rear corner of Packard.

Indicate point of collision.

Date April 26, 1940

Signature L. K. FERREVA

[Endorsed]: Filed Dec. 22, 1941.

Mr. Hogle: What is the date of that, Mr. Scott?

Mr. Scott: I was just coming to that. [20]

Q. You signed that, did you not, on the date it bears, April 26, 1940?

A. When I signed it it had a date, the date was in there, yes.

Q. And at that time you delivered to Mr. Walter Henretty the copy of summons and complaint which are now in evidence?

(Testimony of Leon Karl Fereva.)

A. Either I delivered it, or Mr. Urquhart, one of us; probably he delivered it.

Q. May I ask, did you thereafter receive by registered mail a letter of which this is the carbon copy, bearing date April 29, 1940, and attached to a return registry receipt (exhibiting to witness)?

A. Yes, sir.

Mr. Hogle: May I see that?

(The document was exhibited to Mr. Hogle.)

Mr. Scott: Yes.

Q. And the registry receipt to which I call your attention bears your signature, does it not?

A. Yes, sir.

Q. And was signed by you on May 3, 1940, is that correct

A. Yes, sir.

Q. Calling your attention again to Exhibit 5 introduced in evidence, namely, the document that you signed in Mr. Henretty's office, that is, is it not, the first written notice that you ever gave to the General Accident Insurance Company, or anyone else, in reference to that accident?

A. In writing, yes, as far as I remember.

Q. At the time that you signed that—by the way, you signed that in Mr. Henretty's office, did you not?

A. Well, of that I would not be sure; Mr. Henretty had many papers in my office, and statements, and all that, so I could not say whether I signed it in his office or in my office.

Q. Now, upon the day that you signed that paper, assuming it to [21] have been signed in the

(Testimony of Leon Karl Fereva.)

office of Mr. Henretty in the Bank of America Building in this City, did you state to Mr. Henretty that you did not report the accident earlier because you did not feel it was of enough importance, and because the officers had exonerated you, and that you were greatly surprised to have these papers served upon you the day before? A. No, sir.

Q. Did you make any statement to that effect?

A. Would you read that over again, Mr. Scott?

Q. Surely, Mr. Fereva.

The Court: You might have the witness read the letter.

Mr. Scott: This is a letter from another, and not signed by the witness, your Honor. That is my difficulty. I paraphrased the language.

The Court: Let the reporter read the question.

Mr. Goldstein: You aren't giving the language, Mr. Scott; that is the trouble——

Mr. Scott: Yes, I am giving the language, but I am transferring it back to his language, in the first person.

Mr. Goldstein: You are giving somebody else's language.

Mr. Scott: I am reading from Mr. Henretty's letter repeating the conversation between him and Mr. Fereva.

Mr. Goldstein: Oh, I see.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

A. Not to my knowledge.

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: Q. What was the answer?

A. Not to my knowledge.

Mr. Scott: If your Honor pleases, I desire to offer in evidence the letter of April 29, 1940, with the registry receipt attached, and ask that it take its place next in order among the [22] exhibits.

Mr. Goldstein: No objection.

The Court: Admitted.

(The letter and registry receipt referred to were marked Plaintiff's Exhibit No. 6.)

Mr. Scott: May I have permission to read the letter, your Honor?

The Court: Yes.

Mr. Scott (reading): "April 29, 1940

"Mr. L. K. Fereva

"c/o Fereva Chevrolet Co.

"Lincoln, California

"Dear Sir:

"Re—L. K. Fereva-Chas. Dickinson, et al.

"This will acknowledge receipt of summons and complaint in an action brought against you by Doris May Dickinson to recover damages for personal injuries sustained by her in an accident which is alleged to have occurred on or about February 25, 1940, on U. S. Highway 99E between the cities of Roseville and Lincoln, Placer County, California, at a point approximately two miles south of the City of Lincoln. Said plaintiff Doris Dickinson demands damages in the amount of \$10,000.00 which is in

(Testimony of Leon Karl Fereva.)

excess of the limit fixed by your policy for one person.

“Charles Dickinson, husband of said plaintiff is also a plaintiff in said action and demands damages for personal injuries and damage to property and consequential damage.

“The complaint in said action alleges that the accident occurred on February 25, 1940. I beg to advise that we are accepting said summons and complaint and will handle [23] the defense of said action under a full reservation of all our rights under your policy because of your failure to report the accident promptly and in accordance with policy provisions. Any action heretofore or hereafter taken in the handling or investigation of said accident or suit is not to be construed as a waiver of the rights hereby reserved. Further objections are reserved.

“Said action is pending in the Superior Court of the State of California in and for the County of Placer. The defense thereof has been referred to Gerald M. Desmond, Attorney at law, Capital National Bank Bldg., Sacramento, with whom I would ask you to cooperate in the defense of the action.

“You may, if you desire, associate your personal attorney at your own cost and expense, with Mr. Desmond in the trial of said action.

“Yours very truly,”——

Q. That was signed “William F. Murray,” was it not? A. I think it was, yes.

(Testimony of Leon Karl Fereva.)

Mr. Scott (reading): "Manager, Claims Department.

"WFM:S

"Registered."

And attached to it is the registry return receipt.

Q. Upon receipt, or after receipt of that letter dated April 29, 1940, Mr. Gerald M. Desmond acted, did he not, as your attorney in the defense of the Dickinson action? A. Yes, sir.

Q. And the case proceeded to trial in Placer County and resulted in a judgment against you, did it not? A. Yes, sir.

Q. And while that action was in progress another action was commenced against you, was there not, by Mr. William Kemp, an action [24] commenced the 30th of November, 1940, or thereabouts, in the Superior Court in Butte County? A. Yes, sir.

Q. And you thereupon turned that summons and complaint over to Mr. Henretty? A. Yes, sir.

Q. And thereafter you received, did you not, a letter bearing date December 30, 1940, by registered mail, is that correct? A. Yes, sir.

Mr. Scott: We offer this letter in evidence, if your Honor pleases, together with the envelope in which it was enclosed, reading as follows:—

Mr. Goldstein: No objection.

(The letter and envelope referred to were marked Plaintiff's Exhibit No. 7.)

(Testimony of Leon Karl Fereva.)

Mr. Scott (reading): "December 30, 1940

"Mr. L. K. Fereva

"c/o Fereva Chevrolet Co.

"Lincoln, California

"Dear Sir:

"Re—L. K. Fereva-Wm. Kemp L-6286.

"This will acknowledge receipt of summons and complaint in an action brought against you by William Kemp, to recover damages for personal injuries sustained in an accident which is alleged to have occurred on or about February 25, 1940 on U. S. Highway 99E between the cities of Roseville and Lincoln, Placer County, California, at a point approximately 3 miles south of said city of Lincoln, California. Said plaintiff demands damages in the amount of \$7,905.00. The amount is in excess of the limit fixed by your policy for one person.

"The complaint in said action alleges that the accident [25] occurred on February 25, 1940. I beg to advise that we are accepting said summons and complaint and will handle the defense of said action under a full reservation of all our rights under your policy, until such time as you are advised to the contrary, because of your failure to report the accident promptly and in accordance with policy provisions. Any action heretofore or hereafter taken in the handling or investigation of said accident or suit is not to be construed as a waiver of the rights hereby reserved. Further objections are reserved.

"Said action is pending in the Superior Court of the State of California in and for the County of

(Testimony of Leon Karl Fereva.)

Butte. The defense thereof has been referred to Gerald M. Desmond, attorney at law, Capital National Bank Building, Sacramento, California, with whom I would ask you to cooperate in the defense of said action.

"You may if you desire, associate your personal attorney at your own cost and expense, with Mr. Desmond in the trial of said action.

"Yours very truly,

"Mgr. Claims Dept.

"WFM:S

"Registered."

Q. Now, thereafter, Mr. Desmond continued to represent you, did he not, in both the Dickinson action and the Kemp action? A. Yes, sir.

Q. And that condition continued until January 28, 1941, or thereabouts, is that correct?

A. Yes, sir.

Q. And at that time you received, did you not, this letter in duplicate by registered mail (exhibiting document to witness)? [26]

Mr. Goldstein: The date of that, please, Mr. Scott?

Mr. Scott: January 28, 1941.

Mr. Goldstein: Thank you.

Mr. Scott: Will you check to see if I have the envelope correct on it?

The Witness: Yes.

Mr. Scott: Q. And the answer?

A. Yes, sir.

(Testimony of Leon Karl Fereva.)

Mr. Scott: We now offer in evidence the letter to which I referred, dated January 28, 1941, together with the envelope.

Mr. Goldstein: No objection.

The Court: Admitted.

(The letter and envelope referred to were marked Plaintiff's Exhibit No. 8.)

Mr. Scott (reading): "January 28, 1941"—omitting the letterhead of General Accident——

"William F. Murray

"Manager Claims Department"——

and so forth.

"January 28, 1941

"L. K. Fereva, doing business under the firm name and style of Fereva Chevrolet Co.

"Lincoln, California

"Dear Sir:

"Notice Is Hereby Given to You that General Accident Fire and Life Assurance Corporation, Ltd., denies liability under its policy of insurance heretofore issued to you on or about the 1st day of December, 1939, numbered AG1556, for any loss or damage sustained and incurred, or to be sustained or incurred, by you by reason of accident which [27] occurred on or about the 25th day of February, 1940, in which Charles Gromer Dickinson and Doris May Dickinson and William Kemp claim to have sustained injury and damage to person and property. This denial is based upon your failure to report the accident promptly and in accordance with the policy provisions.

(Testimony of Leon Karl Fereva.)

“You Are Further Notified that in the action brought in the Superior Court of the State of California, in and for the County of Placer by Doris May Dickinson and Charles Gromer Dickinson, husband and wife, against yourself, numbered 11844 in the records and files of the said Court, the Court denied your motion for a new trial on January 23, 1941, and your time within which to appeal from the judgment rendered in said action will expire thirty (30) days thereafter, namely, on or about the 22nd day of February, 1941. Should you desire to appeal from said judgment, Mr. Gerald M. Desmond will furnish substitution to such attorney or attorneys as you may select.

“The action brought by William Kemp against you, in the Superior Court of the State of California, in and for the County of Butte, numbered 18256 in the records and files of said Court, is still pending and has not yet been set for trial. Mr. Gerald M. Desmond is instructed to withdraw from the defense of said action and deliver to you substitution of attorney running to whomsoever you desire to select to represent you.

“Yours very truly,

“GENERAL ACCIDENT AND
& LIFE ASSURANCE COR-
PORATION, LTD.,

“By W. F. MURRAY

“Manager Claims Department.”

(Testimony of Leon Karl Fereva.)

Cross Examination

Mr. Goldstein: Q. You stated to the jury that you had been a resident of Lincoln, Placer County, for how long?

A. Forty-five years, approximately.

Q. And you are married? A. Yes, sir.

Q. Have you a wife and children?

A. A wife and two daughters.

Q. I will ask you to state—what was the nature of your business? A. Automobile dealer.

Q. For what company?

A. The Chevrolet—General Motors.

Q. General Motors. What territory did you have?

A. The territory through Lincoln, Wheatland, Rio Oso, and I don't remember which, either Nicolaus, or Nichols.

Q. Did you have the exclusive agency for those particular portions of Placer County?

A. I did.

Q. You stated in answer to a question by counsel for plaintiff that you had been in business there for about 14 years. Is that about correct?

A. Yes.

Q. And during the time you were in business there you state you [30] were also an insurance agent? A. Yes, sir.

Q. And were you an insurance agent since, let us say, the year 1929—July 1, 1929, up to July 1, 1941? A. Yes, sir.

(Testimony of Leon Karl Fereva.)

Q. And did you do your business exclusively with Wentz & Erlin? A. Yes, sir.

Mr. Goldstein: Now, your Honor, this will save time, I think, if I can get a stipulation from counsel. I have a certified copy of the appointment of Wentz & Erlin as the attorney-in-fact of this company, your Honor, by the United States Manager in New York, and I think it will save considerable time if I can offer it in evidence on this examination, so as to follow it up with what I have. If your Honor pleases, I desire to offer in evidence on behalf of the defendants, Charles Gromer Dickinson and Doris May Dickinson, a certified copy of the power of general agent of Wentz & Erlin issued by the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, and ask to have it marked as Defendants Dickinsons' Exhibit A.

The Court: Admitted.

(The document referred to was marked Defendants' Exhibit A.)

Mr. Goldstein: May I have the privilege of reading it to the jury, your Honor? It isn't very long, but I think to have the continuity it should be read at this time.

This is a certified copy of the power of general agent issued by General Accident Fire and Life Assurance Corporation, Ltd., to Walter B. Wentz and George E. Erlin, doing business as Wentz &

(Testimony of Leon Karl Fereva.)

Erlin, which appointment was dated May 12, 1931:

“Know All Men By These Presents: That the General Accident Fire and Life Assurance Corporation, Ltd., a company or corporation formed under the laws of the Kingdom of Great Britain, and carrying on the business [31] of Casualty insurance in the State of California, has constituted and appointed, and by these presents does hereby constitute, appoint and designate Walter B. Wentz and George E. Erlin doing business as Wentz & Erlin having their place of business at Insurance Center Bldg., 206 Sansome St., San Francisco, California, its true and lawful attorney in fact to appoint solicitors and agents within the State of California in accordance with the provisions of Section 633 of the Political Code, and further authorizes and empowers him, in the name, place and stead of said company or corporation, as principal, to make and execute, and cause to be made and executed, with sufficient sureties, a good and sufficient bond or bonds, as provided in Section 623 of said Political Code, and thereby fully and firmly to bind said company or corporation on its part to perform and keep all the obligations and covenants thereof.

“In Witness Whereof, The said company has to these presents affixed its seal, and caused its name to be subscribed and attested by its Asst. United

(Testimony of Leon Karl Fereva.)

States Manager at Philadelphia, State of Pennsylvania, this twelfth day of May, A. D. 1931.

“[Corporate Seal]

“GENERAL ACCIDENT FIRE
AND LIFE ASSURANCE
CORPORATION, LTD.,

“By JAS. F. MITCHELL

“Asst. United States Manager.

“Attest

“A. BURSTON,

“Chief Accountant.

“The person named must be the General Agent appointed in [32] accordance with the provisions of Section 616 of the Political Code.”

And attached to the power of attorney is a verification:

“State of Pennsylvania

“County of Philadelphia”——

which is duly taken before one E. L. Wright, Notary Public, and the reading, I think, is immaterial.

The certificate of the Commissioner of Corporations reads as follows:

“San Francisco, December 1, 1941.

“I, A. Caminetti, Jr., Insurance Commissioner of the State of California, do hereby certify that I have compared the annexed copy of Power of General Agent issued by General Accident Fire and Life Assurance Corporation, Ltd., to Walter B. Wentz and George E. Erlin doing business as

(Testimony of Leon Karl Fereva.)

Wentz & Erlin, which appointment was dated May 12, 1931, with the original now on file in my office, and that the same is a full, true and correct transcript thereof, and of the whole of said original.

“In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.”

Q. Now, Mr. Fereva, do you know Mr. Walter B. Wentz personally? A. No, I do not.

Q. You never met him, did you? A. No.

Q. Do you know him now?

A. I wouldn't know him.

Q. You have never seen him at all?

A. No, sir.

Q. Who, in connection with Wentz & Erlin, did you deal with since 1929, up to July 1, 1941, when you ceased to be an insurance agent?

A. Mr. Robert Urquhart. [33]

Q. Mr. Robert F. Urquhart. Did Wentz & Erlin, during the period of time I have mentioned, have a branch office in the City of Sacramento?

A. Yes, sir.

Q. Where, in Sacramento, was that office located? A. In the Ochsner Building, I think.

Q. In the Ochsner Building? Were they at one time in the Capital National Bank Building?

A. Yes, sir.

Q. Do you know Mr. Robert Urquhart personally? A. Yes, sir.

Q. Do you know him intimately?

(Testimony of Leon Karl Fereva.)

A. Yes, sir.

Q. Is he a friend of yours?

A. A very particular friend.

Q. And during the ten-year period, let us say, from 1930 to 1940, did you consult him in connection with insurance business you were transacting?

A. Many, many times.

Q. What was his designation? What was he known by?

A. He was district representative.

Q. I show you at random one policy issued—

The Court: Q. District representative of what?

Mr. Goldstein: Q. District representative of Wentz & Erlin?

A. Yes.

Mr. Goldstein: I will connect that up, your Honor, later.

Q. Did you place your insurance policies, and your various insurance coverages through Mr. Urquhart?

A. Yes, sir.

Q. That is, through the Sacramento office?

A. Yes, sir.

Q. How often, can you tell the jury, did he visit you per month, or during the year?

A. Why, two or three times a month.

Q. At your place of business? A. Yes.

Q. In the case of any accident arising under any policy which was issued to you, or through you, who would you report it to?

Mr. Scott: Just a moment. Objected to in so

(Testimony of Leon Karl Fereva.)

far as it deals with any policies other than those of the General Accident. [34]

Mr. Goldstein: If the Court please, I come back, your Honor, that under the pleadings here we have the right to show the system, and method, and practice, and custom, and mode, with reference to reporting accidents or losses, and show just what was done. He is an agent of the company, and I have the right to show what the company did, not only as affecting this one policy—of course, that would not establish a practice, or custom, or mode—but any other loss or accident. That is the law in California, that wherever the question of waiver and estoppel—

The Court: You are speaking of the insurance company involved in this case?

Mr. Goldstein: Yes, sir; the General Accident.

Mr. Scott: That is just the point; you didn't ask him that. That is why I am objecting.

Mr. Goldstein: I stand corrected, Mr. Scott.

The Court: Proceed.

Mr. Goldstein: I will confine myself to the plaintiff corporation here, the General Accident Fire and Life Assurance Corporation, Ltd.

Q. Did you report accidents, or cases of loss, for a period of, say, the last ten years, from the first day of July, 1930, to the first day of July, 1940, to Mr. Urquhart? A. Many of them.

Q. How did you report them?

A. Either by phone or by personal contact.

Q. Orally? A. Orally.

(Testimony of Leon Karl Fereva.)

Q. And on those occasions what happened when you made that report to Mr. Urquhart?

A. Why, he took it up with the necessary channels and they were taken care of.

Q. Did you, during that period—by the way, did you receive commissions on all policies which were issued through your agency? [35]

A. Yes, sir.

Q. Now, let me ask you, Mr. Fereva, did you have the right to insure a man who came to your establishment, on the spot? A. I did.

Mr. Scott: Just a moment. I object to it unless it be limited to the General Accident.

Mr. Goldstein: Your Honor, may I make this suggestion: All my questions, counsel, now shall be limited solely to his company.

Mr. Scott: I am trying to see they are.

Mr. Goldstein: Very well. I will be happy to do it.

The Court: So there will be no difficulty, mention the name of the company.

Mr. Goldstein: I beg your pardon?

The Court: So there will be no difficulty, mention the name of the company.

Mr. Goldstein: Very well. I just was going to simplify it by saying all my questions would be directed to the plaintiff company.

Q. In connection with this General Accident Fire and Life Assurance Corporation, did you have the right to insure a man on the spot for fire and

(Testimony of Leon Karl Fereva.)

theft, public indemnity, public liability, fire insurance, or collision insurance? A. Yes, sir.

Q. Now, will you please state whether or not, if you sold an automobile, let us say, in your establishment at Lincoln, and you then delivered the car, whether or not you notified the individual he was then and there insured?

Mr. Scott: Just a moment. Objected to on the ground it is incompetent, irrelevant and immaterial, unless it be shown he has some authority from the General so to do.

Mr. Goldstein: Your Honor, that is the very thing the Supreme [36] Court held is the test of whether he is a general agent. We can show that by what he did and what the custom was, and, of course, under the license he had a right to do it——

Mr. Scott: Just a moment. I object to that statement. Under that license he had a right to solicit. Wentz & Erlin are the general agents; the other man is a soliciting agent.

Mr. Goldstein: Your Honor, I take issue with that statement, and I want to call your Honor's attention to one thing that Mr. Scott overlooked in this license. The license reads:

“ . . . insurance agent to solicit, negotiate, or effect contracts of insurance . . . ”

Now, your Honor, I want to show he did effect contracts of insurance, and that was the mode and practice, that when he sold a man a car, he insured the man right there, and he notified Mr. Urquhart

(Testimony of Leon Karl Fereva.)

that he had done so, who then notified Wentz & Erlin, and they then sent the policies in, but the man was insured from the very moment he drove out of the garage in the car.

The Court: Proceed.

Mr. Goldstein: Q. Do you understand my question?

A. Will you repeat it?

Q. Did you, during those ten years you were the agent for this plaintiff company, have the right, and did you insure a man on the spot when he came in to your establishment and wanted insurance?

A. Yes, sir.

Mr. Scott: Same objection.

The Court: The objection is overruled.

Mr. Goldstein: Q. How is that?

A. Yes, sir; many, many times.

Q. All right. What did you say to any purchaser of insurance in this company, this particular company? [37]

A. There was a form made out and he was notified he was insured from that minute on.

Q. Now, when the policy came into your possession—. How long would it take for the policy to come to you from Wentz & Erlin, about?

A. Sometimes a week, probably; two weeks, three weeks, or longer.

Q. Now, Mr. Fereva, when the policy came to you, was the policy dated as of the date that you sold the car or insured the man?

A. Yes, sir.

Q. How many times did that happen in the ten-

(Testimony of Leon Karl Fereva.)

year period that you were agent of this plaintiff company? A. Probably hundreds of times.

Q. So that when Mr. Scott asked you whether you signed any policies, you understood by that, did you, that you did not actually sign the policy yourself? A. Yes, sir.

Q. But you did make contracts to insure people for the company, and you did it all those years, is that correct? A. Yes, sir.

Q. And did you do the same thing with your own policies of insurance? A. Yes, sir.

Q. Now, you had numerous policies, did you not? You, personally, had numerous policies?

A. Mr. Urquhart at intervals came to my place of business and talked them over.

Q. Now, your individual policies. I am speaking of policies issued to L. K. Fereva. Did the same thing happen? When you had an automobile, did you insure it yourself and then notify Wentz & Erlin to issue the policy?

A. The forms were mailed right in.

Q. That is what I say.

Mr. Scott: Pardon me. What was that answer?

Mr. Goldstein: "The forms were mailed right in." Will you [38] stipulate, counsel, that this is a certified copy of the designation by Wentz & Erlin of the appointment of Mr. Fereva as an agent for the plaintiff corporation (exhibiting document to counsel)?

Mr. Scott: I will stipulate it is a certified copy of the document which it purports to certify.

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: Very well; thank you.

Mr. Scott: The effect of that document——

Mr. Goldstein: If the Court please, I desire to offer in evidence a notice of the plaintiff corporation of the appointment of Mr. Fereva as an agent of the company—I will use that term at the present time—and ask to have it marked Dickinsons' Exhibit B.

The Court: Admitted.

(The notice of appointment and certificate were marked Defendants' Exhibit B.)

Mr. Goldstein: May I read this to the jury, your Honor? (Reading.) “(Must be filed in duplicate.)

“Notice of Company Appointment

“Name of Company General Accident Fire & Life Assurance Corporation, Ltd.

“To the Insurance Commissioner of the State of California:

“Notice is hereby given that the undersigned insurance company, authorized to transact business in this State, has appointed L. K. Fereva of Lincoln, California, to act as its agent within the State of California, unless license shall be denied, revoked or suspended. This appointment shall remain effective for the license period July 1, 1937, to June 30, 1938, inclusive, but if, before this appointment becomes effective or while it is in effect, any statute is enacted which requires or permits [39] the filing with the commissioner of such an

(Testimony of Leon Karl Fereva.)

appointment to remain effective until filing of a document terminating such appointment, then this appointment shall continue in effect until such document terminating it is filed.

“Dated at San Francisco this 1st day of July 1937.

“GENERAL ACCIDENT FIRE
& LIFE ASSURANCE COR-
PORATION, LTD.,

“By WENTZ & ERLIN,

“By W. B. WENTZ.”

And the certificate dated December 1, 1941:

“I, A. Caminetti, Jr., Insurance Commissioner of the State of California, do hereby certify that I have compared the annexed copy of Notice of Company Appointment issued by General Accident Fire & Life Assurance Corporation, Ltd., to L. K. Fereva, of Lincoln, California, filed July 1, 1937, and which remained in force until July 1, 1941 when Mr. Fereva failed to renew his license with the original now on file in my office, and that the same is a full, true and correct transcript thereof, and of the whole of said original.

“In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

“A. CAMINETTI, JR.,

“Insurance Commissioner.

“By MAE BARR LONG,

“Deputy.”

(Testimony of Leon Karl Fereva.)

Q. Now, Mr. Fereva, prior to 1937 did you have the same kind of an appointment and the same kind of a license as was offered in [40] evidence here?

A. Yes, sir.

Q. Did you also have the same sort of an appointment from the Potomac Insurance Company, through Wentz & Erlin, the same agents?

A. Yes, sir.

Mr. Scott: Just a moment. I move the answer go out, and I would like to object on the ground——

The Court: It may go out.

Mr. Scott: ——it has nothing whatever to do with the issues in this case, not concerning the General.

The Court: What is the purpose of it?

Mr. Goldstein: The purpose is to again show a course of conduct not only so far as this company is concerned, but also another company, and it is circumstantial evidence, if I may use that term, bearing upon the practice, mode, and custom, not only with respect to the agent, but the general agents of the company. This is the same agent and the same general agents, and if we had two or three other companies we would be permitted to show it, because it bears on the whole question of what the agent did and what Mr. Fereva did. Your Honor will recall in the Conney case the Court held that you have to apply all the facts and circumstances indicating a course of conduct which can

(Testimony of Leon Karl Fereva.)

be deemed to be a waiver of a condition of the policy precedent to recovery.

(Argument.)

The Court: The Court will admit it subject to the statement that you will connect it up.

Mr. Goldstein: Very well, your Honor.

Mr. Scott: Does that place upon me the burden of moving to strike it out?

The Court: Yes.

Mr. Scott: May I suggest we are going to have a badly [41] encumbered record if we——

Mr. Goldstein: Your Honor, I am willing to do this: I will withdraw my offer and predicate my entire case on the plaintiff corporation. I will not encumber the record, and I will take no chances on any legal questions involved pertaining to the order of proof.

Q. Mr. Fereva, I will show you two policies, one dated August 1, 1939, another one dated December 16, 1938,—let me have the Mercantile, please—I will take out these policies, all except the plaintiff company. Just take these General Accident policies (exhibiting documents to witness). Take a look at these. Were those policies that I have just handed you, Mr. Fereva, policies issued to you by the plaintiff corporation at other times in addition to the policy now in question?

A. Yes, sir.

Q. Now, when these policies came to you, were they in the form as they are now, with the paster on the bottom as it appears here (indicating)?

(Testimony of Leon Karl Fereva.)

A. Yes, sir.

Q. Now, I asked you a moment ago as to who Mr. Urquhart was, and you said he was the district representative of Wentz & Erlin.

A. Yes, sir.

Q. And he is the man with whom you dealt regarding insurance?

A. Entirely.

Q. Entirely.

Mr. Goldstein: If the Court please, I desire to offer in evidence these five policies, and they are not full in point of time; I have only from December 16, 1938, down to May 10, 1941—I can produce a number of them, but I am just taking a few by way of exemplar, to indicate that these policies—one, for instance, is for public liability, and one is for workmen's compensation, a liability policy, another one is for collision, and the various [42] forms and types of policies issued by the plaintiff corporation, and I just picked those out as samples.

Mr. Scott: Well, I object to them as irrelevant, incompetent and immaterial, as in no way modifying the provisions of the automobile policy—none of them are—there is a garage liability policy, but none are automobile policies such as the one in question, and furthermore, no foundation has been laid for the endorsement by R. F. Urquhart to which counsel evidently is referring on the back thereof; no showing that Mr. Urquhart has any authority whatsoever to waive the provisions of the policy.

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: If your Honor pleases, if that is the situation, I would like to have the privilege of calling to the stand the general agent of the company, and let Mr. Fereva step down until I lay the foundation. I was going to connect it anyway, but when Mr. Scott is that technical——

Step down, Mr. Fereva.

Mr. Scott: Just a moment. Even His Honor agrees that I am right.

Mr. Goldstein: Step down, Mr. Fereva.

Mr. Scott: You know, counsel, once in awhile I am right.

Mr. Goldstein: You have the impression that you are always right, Mr. Scott. Perhaps you are; I don't know.

(The Witness Fereva was temporarily withdrawn.) [43]

WALTER B. WENTZ.

Called for the Defendants under the provisions of Section 2055 C. C. P.; Sworn.

Direct Examination

By Mr. Goldstein:

Q. Mr. Wentz, you are a resident of the City and County of San Francisco? A. Yes, sir.

Q. And have been for a great number of years?

A. Yes.

Mr. Scott: Pardon me. May I ask now, so I may not be confronted with the dilemma as did my friend here a moment ago, in what stage of

(Testimony of Walter B. Wentz.)

the case and in what character is counsel calling Mr. Wentz?

Mr. Goldstein: I am calling Mr. Wentz under 2055, he being the managing agent and the attorney-in-fact for the plaintiff corporation.

Mr. Scott: That may be true, but in what stage of the case——

Mr. Goldstein: I am calling him, if the Court pleases, for the purpose of laying the foundation to introduce certain evidence to meet the technical objection, and it is either in the plaintiff's case or in the Dickinson case, it is immaterial which. I have a right to call Mr. Wentz under 2055, he being the managing agent and attorney-in-fact of the plaintiff.

The Court: Proceed.

The Clerk: For my information, is he being called as your witness?

Mr. Goldstein: Under 2055.

Q. Mr. Wentz, I offered in evidence here Dickinson Defendants' Exhibit A, the certified copy of your appointment as attorney-in-fact of the plaintiff corporation. You are familiar with that document (exhibiting document to witness)?

A. Yes.

Q. And you and Mr. Erlin have been acting as attorneys-in-fact for [44] the General Accident Fire and Life Assurance Company since the date of this appointment, the 12th day of May, 1941?

A. Is that appointment personal, or is it to the firm?

(Testimony of Walter B. Wentz.)

Q. It is to the firm. This designates Walter B. Wentz and George E. Erlin, doing business as Wentz & Erlin. A. Yes, sir.

Q. Where do you have your office in San Francisco? A. In the Insurance Center Building.

Q. It is 206 Sansome? A. 206 Sansome.

Q. And you have a branch office here in Sacramento, have you not? A. Yes, sir.

Q. And where did you have your branch office, let us say from 1930 until 1935?

A. Well, we are a little out of line on that. It is my impression that Wentz & Erlin did not start until 1931.

Q. 1931?

A. Yes; and I doubt whether we immediately had a branch office in Sacramento.

Q. Well, to the best of your knowledge, Mr. Wentz, when, would you tell the jury, did you establish a branch office in Sacramento?

A. My idea is around 1932 or 1933.

Q. Very well. Take the latter date, 1933.

A. Yes.

Q. That would make it in line with your ideas, would it not? A. Yes.

Q. Where was your office located?

A. Personally, I would not know.

Q. Was it in the Ochsner Building, or the Capital National Bank Building?

A. It is in the Ochsner Building now.

Q. Now, but—is that 719 K Street?

(Testimony of Walter B. Wentz.)

A. Frankly, I don't know. I was in the office for the first time in my life the other day.

Q. All right, now, we are getting some place. Do you know Mr. R. F. Urquhart?

A. Yes, sir.

Q. Who is Mr. R. F. Urquhart?

A. Mr. R. F. Urquhart is a [45] salaried employee of my firm.

Q. I know that, but give us his name, his designation, his title.

A. Well, his title is district representative.

Q. District representative. I will show you here, Mr. Wentz, a policy dated July 16, 1938, a garage liability policy, and you will notice a paster on there, "In case of loss, removal, or any change, notify R. F. Urquhart, District Representative, 718 K Street, Sacramento. Phone Capital 7910." You have known of the existence of those pasters?

A. Frankly, I did not.

Q. You did not. Well, he had authority to be notified of losses in case of accidents involving the insured on this policy, did he not?

A. He was charged with no such duties.

Q. Well, what were his duties?

A. His duties I can best describe only to someone who understands the insurance business. He was a resident special agent. His duties have been principally to solicit business, solicit connections through sub-agents. He has not been charged, incidentally——

(Testimony of Walter B. Wentz.)

Q. How is that?

A. He has never been charged with any claim service, and I might explain to you that as far as the General Accident is concerned, I think I should explain to you my firm is not charged with any claim service by the General Accident.

Q. Now, Mr. Wentz, just a moment. I don't want any speeches. If you don't mind, just answer my questions. I think we will get along much better.

Let me have that policy.

Do you mean to tell this jury, Mr. Wentz, that since 1933 to the present time, that you did not know that Mr. Urquhart was receiving notices of accidents and notices of claims of any kind against this plaintiff corporation?

A. I can't say—I believe I can honestly say that it has never been called to my [46] attention that he did report any such accidents, nor did he have occasion to receive them.

Q. Who would know about that, if you don't?

A. I would believe that none of my firm would know about that. It would be under the jurisdiction of the claims department of the General Accident.

Q. Well, was he employed by your firm?

A. By my firm, yes.

Q. Did you pay his salary? A. Yes.

Q. But you don't know what he was doing?

A. As far as claims were concerned, we were paying him no salary for handling claims.

(Testimony of Walter B. Wentz.)

Q. I understand that, Mr. Wentz, but do you say now that you don't know of any instances where some of your agents, or some of your customers reported losses to Mr. Urquhart, or gave notices of accidents, is that what you mean?

A. So far as the General Accident is concerned, I wouldn't know.

Q. You wouldn't know. Well, what salary was he receiving, Mr. Wentz?

A. I honestly don't know that.

Q. You don't know about what the duties of Mr. Urquhart were, or what his salary was is that correct?

A. That is fairly correct.

Q. Who else did you have employed in the Sacramento office besides Mr. Urquhart?

A. I don't think we had anyone else.

Q. Isn't it a fact he had charge of your office for years in Sacramento?

A. It was a one-man office.

Q. That is what I wanted to find out. Did you have correspondence with him?

A. Personally I would have very little.

Q. I am not talking about personal correspondence, Mr. Wentz. You know what I mean. I am speaking of the firm of Wentz & Erlin, insurance agents for the plaintiff corporation. Did you have [47] correspondence with him during those years?

A. Did the firm have correspondence?

Q. Yes. A. Surely.

Q. Isn't it true that he reported accidents to your firm in San Francisco, and he went out and

(Testimony of Walter B. Wentz.)

even investigated accidents and turned cases over to another agent of the company here in Sacramento?

A. For the General Accident?

Q. For the General Accident.

A. I don't think so.

Q. He did it for some other companies, you mean?

A. Yes, sir.

Q. You mean, Mr. Wentz, Mr. Urquhart had the right to report accidents or receive reports of accidents for other companies, but not the plaintiff corporation, is that what you mean?

A. Well, that is practically the case, yes.

Q. Do you know Mr. Walter Henretty?

A. Yes, sir.

Q. What is his business in connection with this insurance company?

A. Frankly, I can't exactly tell you, because——

Q. How long have you known him?

A. I have known him indirectly for maybe 10 or 15 years.

Q. But you don't know what his position was with this company, do you?

A. I don't know, really, what his position is. He doesn't—he operates entirely through and for the claims department of the General Accident.

Q. Well, then, you do know who he is?

A. I know who he is, yes, but I don't know exactly what he does, because that is not under my jurisdiction at all.

Q. I understand, Mr. Wentz, you being the general agents—just strike that. By the way, what

(Testimony of Walter B. Wentz.)

territory do you have under your power of attorney? A. Northern California.

Q. Northern California. Where does it extend from? Just give us [48] some idea.

A. From a line about south of Fresno County north to the Oregon line.

Q. And you are the only ones who have the power of attorney to act for this company?

A. The only ones who have any contract with them.

Q. Now then, I asked you a moment ago as to whether or not Mr. Urquhart was your business representative, and you said that he was.

A. Yes.

Q. Now, Mr. Wentz, do you know Mr. Fereva at all, one of the defendants here? A. No, sir.

Q. Did you ever talk to him? A. No, sir.

Q. Do you know whether Mr. Erlin, your partner, knows him? A. I don't know.

Q. Did you in any way have any contact at all in connection with any insurance policies that were written by you for him or through him for anybody else?

A. Not until the—I never heard of the man until after this case came up.

Q. I see. However, this is true, is it not: that on the 1st day of July, 1937, you signed a notice of company appointment of Mr. L. K. Fereva as an agent for your company? A. I believe so.

Q. And isn't it true that as an agent for the company he had the right to insure people when he

(Testimony of Walter B. Wentz.)

sold a car, or when he had them in his office, and then notify you, and you sent a policy in there and dated it as of that date?

A. I don't understand so.

Q. Didn't he do it?

A. Not with my knowledge.

Q. Didn't your company do it? A. No, sir.

Q. Doesn't every insurance company do it?

A. No, sir. I have no right myself, as an agent, to execute a verbal policy of insurance.

Q. Well, it is done, isn't it?

A. No, sir. [49]

Q. Isn't it a fact your company did sign these policies and send them to Mr. Fereva time and time again, and dated them the date the application was dated? A. Yes, sir.

Q. That is correct, is it? A. Yes.

Q. That was done, was it? A. Yes.

Q. So if an application came in, let us say, dated noon, December 22, in your office, and your policy went out a week or two weeks hence, it would be dated noon, December 22, and not a week or two weeks later, is not that a fact?

A. Yes, but it would not be dated at all unless we accepted the coverage.

Q. But if you accept the coverage it is then dated the date of the application?

A. If we accept it.

Q. Now, in Mr. Fereva's case, he testified he had hundreds of policies issued through him for people who came in to his place of business; that he had

(Testimony of Walter B. Wentz.)

insured them and notified the company, and the policy came in within a week or two weeks. That is correct, is it not?

A. I can't say I heard all he said.

Q. But if that was done, that would be in accordance with the practice of your insurance company?

A. Well, if he believed he had a right to insure anybody, they were insured as soon as he told them they were, he is entirely wrong from my standpoint. I never agreed with him that he had any such right.

Q. You never talked to him, did you?

A. We have never given any agent any such right.

Q. You have never given any agent any such right, and you have no such right yourself, but you do it all the time, don't you?

A. No, we dont.

Q. Oh, Mr. Wentz——

A. We are furnished with cover notes, cover notes with the signature of the United States manager on them, and we countersign [50] those and send them out.

Q. Mr. Wentz, isn't it true that every agent that you appoint for this company, the plaintiff corporation, practically insures people on the spot when they come in and say, "I want to insure my automobile, my house," or whatever it is, the man says, "You are insured, and you will get your policy within a week or so"? Isn't that true?

(Testimony of Walter B. Wentz.)

A. I don't know of any agent we have who has a right to do that.

Q. Mr. Wentz, isn't that the custom, and wasn't that followed by your company and by Mr. Fereva?

A. No, it wasn't followed by Mr. Fereva, not with my consent.

Q. Just a moment, Mr. Wentz. Isn't that the custom? Isn't that done all the time?

Mr. Scott: Just a moment.

Your Honor,——

Mr. Goldstein: Your Honor, I am entitled to get a direct answer, as to whether or not that is the practice and has been the practice of this company all during the time for, let us say, the last ten years.

A. The answer is no.

Q. No. Very well. Then you don't know what Mr. Urquhart did in regard to that at all?

A. I know what he didn't have any right to do.

Q. I am not asking you that, Mr. Wentz. I am asking you if you know what he did.

A. I don't know what the other fellow did under any circumstances.

Q. Well, he was employed by you as district representative. What was his salary, Mr. Wentz?

A. I told you that I don't know.

Q. You don't know. How long has he been working for your firm?

A. For the present firm, I believe it has been almost since we [51] have been in existence, and that has been ten years; since 1931.

(Testimony of Walter B. Wentz.)

Q. And what do you mean, that he was a soliciting agent?

A. Well, I mean his duties were principally in connection with acquiring business.

Q. Acquiring business from whom? Individuals?

A. No; from agents.

Q. Agents, yes.

A. And brokers.

Q. And brokers. All right. So he dealt directly with agents and brokers, insurance brokers and insurance agents in California? That is correct, is it? And he dealt with your agents, and appointed agents, did he not?

A. What do you mean, our agents?

Q. Did he not contact and visit your agents of the General Accident?

A. Yes.

Q. Health and Life Assurance Corporation?

A. Yes, but principally for our other companies.

Q. For your other companies, yes. But I can't go into that. I have been confined to this company, and I am asking you, Mr. Wentz, whether for this company, if he did not visit your agents with reference to your company's business, and discuss matters with them with reference to insurance?

A. I think he did.

Q. So he was representing you in that capacity at least, wasn't he?

A. In the capacity of a soliciting agent, yes.

Q. Why do you always put the word in, "soliciting agent?"

A. Well, because that is my idea of his duties.

Q. Didn't Mr. Urquhart see your agents in con-

(Testimony of Walter B. Wentz.)

nection with claims they may have had, and discuss them with them?

A. Not for General Accident claims, he wasn't supposed to.

Q. Other insurance companies, yes, but not the General Accident?

A. Not the General Accident. [52]

Q. Why that distinction, Mr. Wentz?

A. Because the General Accident has provided us with a claims department which is entirely outside of our jurisdiction. We house it, but there is an organization consisting of about five men and eight or nine women operating as a claims department for the General Accident, and we have no authority over that organization, do not pay their salaries, do not pay their expenses, and, as I say, we have no authority over them.

Mr. Goldstein: Just one question, your Honor.

Q. You don't know, then, of any of the notices that were sent in by Mr. Urquhart to the General Accident, this other office we are speaking about, reporting accidents, do you?

A. I do not. If he sent them in for the General Accident he would have sent them to the claims department.

Q. To Mr. Murray, is that right? A. Yes.

Q. And he may have done that?

A. He may have.

Q. And you do not know of it?

A. I do not know of it.

(Testimony of Walter B. Wentz.)

Q. If he did that would you say he had no right to do it?

A. I would say he was not under duty to do it.

Q. But he did it for a great many years, did he not?

A. I don't think there is very many he did it.

Mr. Goldstein: That is all, Mr. Wentz. [53]

Mr. Scott: Mr. Henretty.

WALTER B. HENRETTY,

called for the Plaintiff; sworn.

Direct Examination

Mr. Scott: Q. Your name is Walter B. Henretty?

A. That is right.

Q. And where do you reside?

A. Sacramento.

Q. What is your occupation?

A. I am an attorney.

Q. And how long have you been an attorney?

A. Well, in California, 19 years.

Mr. Goldstein: I didn't get the answer.

The Witness: In California, 19 years.

Mr. Scott: Q. In connection with your practice of the law, do you, from time to time, handle business for the claims department of the plaintiff company? A. I do.

Q. And in this area? A. Yes.

Q. And that is done under the direction of whom?

(Testimony of Walter B. Henretty.)

A. Mr. William F. Murray; he is the manager of the claims department.

Q. Mr. William F. is and has been very ill for a long time, has he not? A. That is right.

Q. Are you acquainted with Mr. L. K. Fereva, one of the defendants in this action? A. I am.

Q. How long have you known Mr. Fereva?

A. Well, I wouldn't be [55] able to say exactly, but I have known him—well, I knew him prior to the time this matter arose, but exactly how long I couldn't tell you.

Q. Calling your attention to Plaintiff's Exhibit No. 5 in evidence, I ask you whether you have ever seen that document before?

A. Yes; I prepared it.

Q. And when and where did you prepare that document?

A. On April 26, 1940, in my office in the Bank of America Building in Sacramento.

Q. And at that time Mr. Fereva, the defendant—one of the defendants, was present?

A. He was.

Q. At that time and place did you have a conversation with Mr. Fereva on the subject of reporting the happening of an accident? A. I did.

Q. And calling your attention to the fact that the accident itself appears to have been on February 25, 1940, and this report is made out April 26, 1940, 60 days thereafter, can you state whether or not anything was said by Mr. Fereva on the topic, as to why the report was so late? A. It was.

(Testimony of Walter B. Henretty.)

Q. Did you, at that time and place, and in the presence of Mr. Fereva, make a memorandum of what he stated on that subject to you?

A. I did.

Q. Have you that memo? A. I have

Q. Will you please produce it?

A. (Witness produces document.)

Q. Will you state what Mr. Fereva, at that time and place, said to you upon the subject?

Mr. Goldstein: Just a minute. If the Court please, I am going to object to this unless the witness cannot state the conversation without referring to the memorandum. The best evidence, [56] of course, is what was said. The memorandum is only secondary.

The Court: Well, he may refresh his memory by it.

Mr. Goldstein: To refresh his recollection.

A. Well, I asked him why he had not reported the matter, and pointed out it was more than two months, and asked him why he hadn't done it. "Well," he said, "the reason I did not report it was that I didn't feel it was of enough importance, and the highway patrol exonerated me completely."

Mr. Scott: Q. What, if anything further, did Mr. Fereva say to you at that time upon that subject?

A. Well, there was no further elaboration of it. He might have repeated the same—I pointed out to him that it was going to be a serious handicap to have delayed it so long, and he might have repeated

(Testimony of Walter B. Henretty.)

it—I didn't write that repetition down. He might have repeated that the officers had exonerated him is why he hadn't done anything about it.

Mr. Scott: Take the witness.

Cross Examination

Mr. Goldstein: Q. Mr. Henretty, may I see that memo?

A. (Witness produces document.)

Q. You write shorthand, don't you?

A. I do.

Q. And whenever you write shorthand the man whom you are talking to doesn't know what you are writing, isn't that true?

A. Well, I assume he doesn't.

Q. Well, now, let's see. You say you have been in California for 19 years, and you are an attorney?

A. No, I didn't say that.

Q. Well, you have been an attorney for 19 years in California? A. Yes.

Q. You are not practicing law here, are you?

A. Yes, I am.

Q. In what way? [57]

Mr. Scott: I suggest, if your Honor pleases, that that is incompetent, irrelevant and immaterial.

Mr. Goldstein: I submit the question, your Honor.

The Court: Proceed.

Mr. Goldstein: Q. In what way are you practicing law?

A. Well, I am practicing law.

Q. As an insurance adjuster, isn't that right?

(Testimony of Walter B. Henretty.)

A. Well, I represent several insurance companies.

Q. You practice law as an insurance adjuster, is that not right? Investigating claims, representing various insurance companies regarding losses; and that is what you call practicing law, isn't that true?

A. Well, I do investigate claims. I investigated this one, too. But I have other business.

Q. Other business. Do you try cases in the Superior Court? A. Yes.

Q. What kind of cases?

Mr. Scott: Objected to as incompetent, irrelevant and immaterial.

Mr. Goldstein: I submit the question.

The Court: I think that is immaterial.

Mr. Goldstein: Very well.

Q. But isn't it a fact, Mr. Henretty, that your main business is acting as an insurance adjuster and investigator for various companies in connection with accidents, losses, indemnity losses, fire losses, theft losses, and the like?

A. Well, you covered too much ground there, Mr. Goldstein.

Q. Well, I will withdraw some of it. Let me eliminate some of it.

A. It is a fact that I have substantial business representing insurance companies.

Q. That is most of your business, isn't it?

A. Well, I don't [58] know whether you would want to take that division—whether it is most of my time, or most of my income—

(Testimony of Walter B. Henretty.)

Q. These are your original notes in this case, are they not? A. That is right.

Q. You have given the jury just a few statements. What about all the rest of your shorthand here?

A. I would be glad to read it to you.

Q. No one could understand it unless you read it, is that true? A. That is right?

Q. So whatever you have here are your own personal notes in shorthand?

A. That is right.

Q. And you read just the portion Mr. Scott asked you about?

A. Well, that is the only portion that relates to why he didn't report the accident.

Q. What does the rest of it relate to?

A. It relates to the details of the accident as he gave them to me.

Mr. Goldstein: If your Honor please, I will offer these original notes as corroboration of his testimony as to what appears there, and ask it be marked Defendants' Exhibit next in order.

The Court: Admitted.

Mr. Scott: If your Honor pleases, I respectfully submit they are incompetent, irrelevant and immaterial, and merely encumber the record. I am not going to object very strenuously, if counsel sees any benefit to be gained from them.

Mr. Goldstein: If the Court pleases, I understand it to be the law that where a witness identifies the original notes as being the means and

(Testimony of Walter B. Henretty.)

mode of his recollecting, that they are proper and competent evidence, and we are offering these to indicate that what the witness has testified to cannot be read by anyone else. [59]

The Witness: I can recollect it, your Honor; I can remember the occasion quite well. I can remember the phraseology quite well. I don't have to refer to those notes.

Mr. Goldstein: Q. You say you remember it quite well? A. Yes.

Q. And this conversation took place on the 26th day of April, 1940? A. That is right.

Q. You have had dozens and dozens of accidents since that time that you have investigated, isn't that true? A. Very probably.

Q. And you have been spoken to a great many times by people, witnesses, insureds, and other persons? A. Very probably.

Q. And do you mean to say now you can recall and recite a conversation that you had with those people on any particular day without referring to notes?

A. Maybe not, but this is different, Mr. Goldstein.

Q. What impresses this on your mind?

A. I had a number of other conversations with Mr. Fereva on it. This very thought ran through this whole case, his failure to report the same, and the prejudice that arose. It came up time after time.

(Testimony of Walter B. Henretty.)

Q. Mr. Henretty, you were talking about a written report.

A. What do you mean, written report?

Q. To Mr. Fereva in this conversation. Weren't you talking about a written report?

A. No; any kind of notice whatsoever.

Q. Did you make any such statement to him?

A. What do you mean, did I make any such statement to him?

Mr. Goldstein: Strike that.

Q. Did you ask him whether he reported it at all to anybody?

A. No. He said he had not, and his reason was this:—

Q. Isn't it a fact that what you were talking about was a written report? A. No. [60]

Q. Isn't it a fact what you considered was prejudicial was the failure to file a written report?

A. No. What I figured was prejudicial was his failure to tell anybody about it. For example—

Q. Now, just a minute—

Mr. Scott: Just a minute.

The Court: You interrupted him, Mr. Goldstein.

Mr. Goldstein: Q. Go ahead and finish your answer.

A. In working on the case we ran into different snags. People told us, "Well, I can't remember. Why didn't you come to see us at the time?" Well, I didn't know about it. I told Mr. Fereva several times, and he heard these people, some of them told me, "Well, if you asked me earlier I might have re-

(Testimony of Walter B. Henretty.)

membered." I said to him, "There you see what happens by reason of not telling us about it. You should have told us in March."

Q. Mr. Henretty, didn't you investigate this case yourself? A. Yes, I did.

Q. Took the statements of witnesses?

A. Some of them.

Q. Didn't you have every available witness in court on the trial of this case in Placer County?

A. Well, there were a couple that were there said they couldn't remember anything; they were too late. If I had asked them at the time——

Q. What you mean is you were trying to suggest something that they could not remember, isn't it?

A. No. I can give you an example of a witness that was there. It was an officer. He said, "I can't remember anything about it. Why didn't you come to us when it was fresh?"

Q. Don't you remember that officer testified in this case? A. He did not testify.

Q. Isn't it a fact an officer did testify?

A. It was a different officer. [61]

Q. The other officer didn't know anything about it?

A. He didn't remember. That was Captain La Porte.

Q. But the officer on the ground did testify, didn't he?

A. Well, La Porte was there probably as quickly as the other one.

(Testimony of Walter B. Henretty.)

Q. Mr. Henretty, how long have you been working for this company, the plaintiff corporation, the General Accident Fire and Life Assurance Company?

A. Well, I don't work for them at all. When I finish a job I send them a bill.

Q. They pay you by the case?

A. They pay my bill.

Q. How long have you been working for them by the case?

A. I would say the first was in 1923.

Q. In 1923. That is a matter of 18 years?

A. Yes.

Q. That is one of the oldest companies that you have been working for since you were in California as an attorney?

A. That is right.

Q. By the way, where did you come here from?

Mr. Scott: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Goldstein: Q. But at any rate the plaintiff corporation here is one of your clients?

A. Yes.

Q. In accident work, or indemnity work, fire and theft, matters of that kind?

A. Not fire and theft.

Q. Not fire and theft, but liability insurance. And you have handled hundreds of cases for them?

A. Yes, sir.

Q. And you still expect to handle them?

A. I hope so.

(Testimony of Walter B. Henretty.)

Q. You are still employed by them whenever they have work in this territory?

A. That is right.

Q. You have an interest in this case, haven't you?

A. No, sir. [62]

Q. Well, you have been in this courtroom every day.

A. I am under subpoena.

Mr. Scott: He is under subpoena.

Mr. Goldstein: I think I have the right to show the interest of the witness.

The Court: He said he had no interest in it.

Mr. Goldstein: I didn't hear it.

Mr. Scott: You should listen.

The Court: What was the answer?

(Record read.)

Mr. Goldstein: Q. However, you personally having been the adjuster and investigator of the case, would like to see the corporation win this case, wouldn't you?

Mr. Scott: Just a minute. I submit it is an improper question, incompetent, irrelevant and immaterial. In other words, are we going to leave the issue as to law or fact to vote of the witnesses?

The Court: The objection is overruled.

Mr. Goldstein: Will you read the question, Mr. Reporter?

(Question read.)

A. Well, I suppose if I personally was to choose sides on the thing, I realize that Mr. Fereva never told them anything about this accident until more than two months afterwards; I suppose you might

(Testimony of Walter B. Henretty.)

say if I am going to have any interest one way or another I might favor the company. Human nature, you know, is sort of that way. But it doesn't mean anything to me. I won't get anything out of it. If they win this case I will get paid; if they lose the case I will get paid. It will be the same amount either way.

Mr. Goldstein: Q. You know Mr. Murray very well? [63] A. Yes.

Q. You are intimate friends?

A. I know you well.

Q. I don't care anything about that. I think I know you, also. You know Mr. Murray very well; he is an intimate friend of yours, is that correct?

A. Yes.

Q. You have known him for about 18 years?

A. I have known him longer than that.

Q. But you didn't know Mr. Fereva, except you say you met him prior to the time he came into your office on the 26th of April, 1940, is that true?

A. Well, I knew him before that, but I wasn't asked how long I knew him before that. I couldn't say. I just met him prior to that.

Q. How much prior to that?

A. I couldn't say.

Q. Did you meet him in Lincoln? A. Yes.

Q. Isn't it a fact you have investigated accidents over there for this same company for Mr. Fereva? A. I don't recall.

Q. Isn't it a fact, Mr. Henretty, that within a year prior to the 26th of April, 1940, you were in

(Testimony of Walter B. Henretty.)

Lincoln and investigated an accident Mr. Fereva had to one of his own cars? A. It could be.

Q. As a matter of fact, weren't you there more than once on cases and accidents that Mr. Fereva had, or some of his clients had?

A. Probably. I don't recall exactly, but it could be, yes.

Q. But in any event you know Mr. Murray, whether or not you do Mr. Fereva? A. Yes.

Q. You also know Mr. Wentz, don't you?

A. Well, yes.

Q. How many years have you known him?

A. Well, I am not very well acquainted with Mr. Wentz even now, but I would say I had known him to identify him for 12 or 15 years, and somewhere along in there I got personally acquainted with him.

Q. You know Mr. Scott, do you not?

A. Yes. [64]

Q. How long have you known him?

The Court: Is this material?

Mr. Goldstein: Your Honor, it is just my last question on the subject, just to show——

Mr. Scott: Well, I object to his knowledge as to myself as quite immaterial.

Mr. Goldstein: It only goes to the matter of interest, your Honor, and I think it has been held to be competent. However, I will withdraw the question.

Q. Mr. Henretty, if you have that definite recollection of this conversation of April 26, 1940, how is it you cannot tell this jury when, and how many

(Testimony of Walter B. Henretty.)

times you went to Lincoln to investigate accidents that Mr. Fereva may have had prior to that time?

A. Well, that is a good deal like saying, "Where were you on the 20th of September, 1917?" You might remember where you were on the Fourth of July, 1936, or on Christmas Day, or New Year's Eve, but you pick an odd date at random, you cannot answer. This case—I worked on this case since April 26, 1940. It started out rather unusually, in that there was a long delay, and as time went on the thing began to kick back at us. Then, of course, there was a trial up in Auburn. This case has been in my mind. I have carried it along, done quite a bit of work on it. As you go along with the thing it impresses itself on you. I made notes of the things, and I reviewed the notes. I can tell you even the hour he came over there.

Q. In other words, you became especially interested in this case?

A. No, don't put it that way. I have other cases that I have as much interest in. But I do remember the circumstances.

Q. Mr. Henretty, you have been in Sacramento for at least 20 years prior to the 16th day of April, 1940, is that right? [65]

A. Yes, more than that.

Q. Did you ever, at any time, prior to the date of April 26th, see or prepare a written accident report for Mr. Fereva?

A. Well, I can't tell you. Maybe I did; maybe I didn't. If he says that I handled some for him,

(Testimony of Walter B. Henretty.)

then I very probably did, because that is the way it started.

Q. But did you receive any such accident report from Mr. Fereva that you know anything about, other than this?

A. Well, I cannot answer that yes or no.

Q. Well, if you went to Lincoln to investigate any accident, who sent you there?

A. Well, it could have occurred in more than one way.

Q. Well, give me any way.

A. Well, one way would be that I might get a letter from the company telling me, or asking me to do so. I might have been notified, or something, by Mr. Urquhart, or Mr. Fereva, and have gone there. I can't remember specifically whether I did or not. I probably—if you would cite the instance, if you have any such information, I might remember.

Q. Pardon me, Mr. Henretty. Where is your office located?

A. Bank of America Building.

Q. And you know Mr. R. F. Urquhart?

A. Yes.

Q. How long have you known him?

A. Oh, about nine or ten years.

Q. And you have known that during that period he has been district representative of Wentz & Erlin, or General Accident Fire and Life Assurance Corporation?

Mr. Scott: Pardon me. I object to that; that involves two or more things.

(Testimony of Walter B. Henretty.)

The Court: You may reframe the question.

Mr. Goldstein: Q. During that time you had business relations [66] with him, did you not?

A. In the early part I don't believe I did.

Q. When did you start to have relations? Let us get down to brass tacks. When was it?

A. I couldn't be specific, but probably along about 1932; maybe 1933; maybe 1934. But he wasn't with Wentz & Erlin then.

Q. He was with some other company?

A. I believe he was in business for himself.

Q. Well, when did you start to do any business with him in connection with the General Accident Fire and Life Assurance Corporation, Ltd., the plaintiff here?

A. Oh, I would say along about 1935.

Q. All right. Since 1935 he has referred to you for investigation accidents which were reported to him regarding the plaintiff corporation, isn't that true? A. Yes, occasionally.

Q. Then after he reported those accidents to you, you went out and did your work, investigated the case, took photographs, took statements, interviewed witnesses, isn't that right?

A. Well, yes; that all depended upon what it was.

Q. How did you meet Mr. Fereva on the 26th day of April, 1940?

A. Mr. Urquhart telephoned me and said L. K. Fereva had told him about an accident he had,

(Testimony of Walter B. Henretty.)

and he said, "I am going to bring him over," and the two of them came over to my office.

Q. That is what I want to find out. Mr. Urquhart brought Mr. Fereva to your office?

A. Yes. Urquhart said—I think it was Mrs. Fereva had telephoned earlier that her husband wanted to come down—it might have been Mr. Fereva done the telephoning—and he came down there with a summons and complaint that had been served on him the day before, and that was the suit you filed. So Urquhart called me up and brought him over there. [67]

Q. That was the occasion you met Mr. Fereva, and the occasion you prepared this written report of the accident? A. Yes.

Q. Between the time that Mr. Urquhart phoned you and brought Mr. Fereva over there you did not talk with anyone representing the company? In other words, with Mr. Wentz or Mr. Scott. Isn't that true? A. No, I didn't.

Q. In other words, you had authority—when Mr. Urquhart came in there with a case you had authority to go ahead and investigate it, isn't that right?

A. Yes.

Q. And that is what you had been doing for years? That is correct? A. Yes.

Mr. Goldstein: That is all.

Redirect Examination

By Mr. Scott:

Q. Immediately upon the signing of this Exhibit 5 by Mr. Fereva did you forward the sum-

(Testimony of Walter B. Henretty.)

mons and complaint that this gentleman had brought in, and the report to Mr. Murray of the claims department of the General Accident?

A. You mean by report that printed form?

Q. Yes. A. Yes.

Mr. Scott: That is all.

Mr. Goldstein: I have no further questions.

The Court: That is all.

The Witness: Was this made an exhibit, the shorthand notes?

Mr. Goldstein: No, I didn't introduce them, your Honor.

Mr. Scott: Might I put Mr. Wentz upon the stand?

The Court: Yes.

Mr. Scott: Mr. Wentz.

WALTER B. WENTZ,

Recalled by the Plaintiff; Previously sworn. [68]

Mr. Scott: If your Honor pleases, I wish to ask, on redirect examination, two or three questions, to straighten out the record.

Direct Examination

By Mr. Scott:

Q. Mr. Wentz, yesterday you were asked about the firm of Wentz & Erlin and its representation of the General Accident Fire and Life Assurance Corporation, and testified that you and Mr. Erlin

(Testimony of Walter B. Wentz.)

were the general agents of the General Accident; that is correct, is it? A. Yes.

Q. Now, in your business as general agent what, if anything, does your agency have to do with the claims division of the General Accident Fire and Life Assurance Corporation?

A. We have nothing to do with the claim service, except that we house the claims department.

Q. The claims service, or claims department, is a branch of the company itself, is it?

A. Of the company itself.

Q. Now, as a firm of general agents, will you state whether or not Wentz & Erlin are and have for some years been the general agents of a number of other insurance companies as well?

A. Yes, sir.

Q. And during this time in, say, the years 1939 and 1940, what other insurance companies did Wentz & Erlin represent as general agents?

Mr. Goldstein: If the Court please, we object to that upon the ground it is incompetent, irrelevant and immaterial, and it is the same matter that I was going to go into yesterday, and Mr. Scott very promptly objected. He said no question about any other company had anything to do with this case; it was what was done in this case by this company. Now, if he wants to open up the question I have to go into it right down the line. We will either [69] confine the issue to the plaintiff corporation, or else we will open the door to all these things, and I will object to it unless I have the right to meet the issue

(Testimony of Walter B. Wentz.)

not only in this firm, but also as to the agency of the Defendant Fereva.

The Court: You may. The objection is overruled.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

The Witness: You desire me to name the companies?

Mr. Scott: Q. Please, and tell what line of insurance that company carries.

A. The Mercantile of New York, for fire insurance.

The Court: How is this material, Mr. Scott?

Mr. Scott: Only indirectly, your Honor. In this respect: I wish to show that Mr. Urquhart, the district representative here, handled the work of Wentz & Erlin, general agents,—if it might so be true—for some six or seven various insurance companies, and show further that of those companies the only company that maintained in the office a complete claims department of its own as distinguished from the agency was the General Accident.

Mr. Goldstein: If the Court pleases, that absolutely would not be binding upon us at all, because ostensible agency can be created regardless of whether they have a division separate and apart from the main office. Your Honor is familiar with the ostensible agency proposition.

The Court: The Court will sustain the objection, Mr. Scott.

(Testimony of Walter B. Wentz.)

Mr. Scott: But even apart from that, might I, with due respect to your Honor, suggest what I have in my mind?

The Court: Yes.

Mr. Scott: The matter was touched upon by quite a number of [70] questions propounded by counsel for the defense, with the result that somewhat of a confusion remains in the record on the subject, and for that reason I want to show the setup. It is for that purpose.

The Court: Proceed.

Mr. Scott: Q. Will you proceed with the answer, Mr. Wentz?

A. Am I to proceed?

Q. Yes.

A. I mentioned the Mercantile of New York, fire insurance, which includes automobile fire coverages. The Potomac Insurance Company, for fire and automobile coverages. The Scotch Underwriters of Caledonia, for automobile coverages only. The United States Merchants and Shippers——

Mr. Goldstein: I didn't get that last name.

A. The United States Merchants and Shippers for automobile coverages only. I would like to explain that when I speak of automobile coverages I mean coverages to the automobile itself. None of those companies write what I call casualty insurance, which is insurance of the owner of the car. I mean they write fire, theft and collision, and no more.

(Testimony of Walter B. Wentz.)

Mr. Scott: Q. That is against loss or hazard to the property of the owner itself? A. Yes.

Q. As distinct from that of third persons?

A. Yes.

Q. Proceed.

A. In order to give you the list, I should further mention the Seaboard Surety Company, who write only bond, and no insurance.

Q. Now then, in connection with all of those other companies, did any of them contain separate claims departments in your agency?

A. None of them except the General Accident.

Q. At Sacramento you testified you had a one-man office consisting of Mr. Urquhart, is that correct? A. Yes. [71]

Q. And in connection with the business of Wentz & Erlin you said he was a salaried employee of your partnership, is that correct? A. Yes.

Q. Now, in connection with the business of these numerous companies which you have enumerated, will you state what the duties of Mr. Urquhart were?

Mr. Goldstein: Now, if the Court pleases, I am going to definitely object to this on the ground it is highly incompetent, irrelevant and immaterial, and has no bearing upon the present issue in the case.

The Court: The objection is sustained.

Mr. Scott: Might I subdivide the question, your Honor? I don't know what the practice is, whether in asking questions we stand up in this court or

(Testimony of Walter B. Wentz.)

not, your Honor. I have been sitting, but it is not out of disrespect of the Court.

The Court: I appreciate that.

Mr. Scott: Q. What, if any, duties did you, or your firm of Wentz & Erlin, delegate to Mr. Urquhart with reference to the General Accident Fire and Life Assurance Corporation?

A. My answer to that is that I don't remember that we delegated any specific duties to Mr. Urquhart as to the General Accident. His efforts for the General Accident as a special agent did not amount to ten percent of his production.

The Court: Q. What is meant by that last?

A. Beg your pardon?

Q. What is meant by the production?

A. Well, he is credited on our books on the amount of business that he influences into the office, and I will explain that his duties were largely in connection with the production of fire business and automobile fire business rather than casualty business. [72]

The Court: The Court only asked the question so the jury can understand you. "Production," standing alone, is meaningless.

Mr. Scott: Q. And was Mr. Urquhart given authority to write policies of insurance or make endorsements thereon for the General Accident Fire and Life Assurance Corporation? A. No, sir.

Q. Was he authorized by your partnership to make or enter into any oral contracts of insurance on behalf of the plaintiff company?

(Testimony of Walter B. Wentz.)

A. No, sir.

Mr. Scott: That is all. Take the witness.

Mr. Goldstein: This is cross examination of the witness, your Honor, called by Mr. Scott.

Mr. Scott: Just a moment. I examined Mr. Wentz on redirect examination as a witness called adversely by counsel.

Mr. Goldstein: Well, if the Court pleases,—

Mr. Scott: So we will understand our positions correctly. That is my position.

Mr. Goldstein: If your Honor pleases, that is why I made the statement this morning that I desired the examination yesterday to be considered as part of the defendants' case, so as to avoid any mixup.

Mr. Scott: I appreciate that, your Honor, but the point is this—that is an afterthought, after the gentleman has rested overnight, but I assume that what he was trying to do was done yesterday when he, himself, called this witness to lay a certain foundation with reference to Mr. Urquhart's authority before proceeding further in interrogating Mr. Fereva. That was done under a mild objection by me, and I think properly, considering the nature of this action, it being one for declaratory relief. We come here not as usual adverse parties, but come here laying [73] the entire problem before this Honorable Court, asking that our rights be determined. Now, having done that under his own volition I interviewed the witness to try to untangle the mess he left, asking him a few questions on

(Testimony of Walter B. Wentz.)

redirect examination. I don't believe the gentleman can now recross examine.

Mr. Goldstein: I will not cross examine. I will ask him a few questions in connection with the subject matter before the Court.

The Court: Proceed.

Cross Examination

Mr. Goldstein: Q. Mr. Wentz, who gave Mr. Fereva any instructions relative to any insurance company that he was the agent for under your appointment?

A. Who would give him those instructions?

Q. Yes, sir.

A. I would say in all probability it would be my partner, Mr. Erlin.

Q. Do you know, Mr. Wentz, whether your partner, Mr. Erlin, ever even saw Mr. Fereva in his life?

A. Oh, Mr. Fereva?

Q. Mr. Fereva; that is the man I am talking about.

A. Oh. I am afraid I didn't get your question.

Q. Pardon me, Mr. Wentz. I don't want to mislead you at all. I am going to put this very plainly. Now, I will put the question back to you again. Who gave Mr. Fereva any instructions regarding the writing of insurance and the manner and form in which it was to be done in connection with the power of appointment that you filed with the Insurance Commissioner of the State of California?

A. I would say that I believe that if there was

(Testimony of Walter B. Wentz.)

any communication on the subject with Mr. Fereva it would be by Mr. Urquhart.

Q. That is correct. Now then, so that anything, as far as your firm is concerned, Mr. Wentz—anything that Mr. Fereva did in [74] connection with obtaining insurance for your office, whether it was the General Accident, the Potomac, or the Mercantile, or the Seaboard, or the Scotch Underwriters, it would come into your office, but you didn't know how it got there, isn't that right, except that somebody took that business and directed it into your office; isn't that correct?

A. Not exactly. I feel that some business may have been sent in directly from Mr. Fereva to the San Francisco office.

Q. All right. Let me ask you, Mr. Wentz, will you please tell the jury what is your mode of operation in connection with a casualty policy, or indemnity policy, including fire, collision, property damage, or public liability; you say you write the policy in San Francisco?

A. In San Francisco.

Q. Let us get this plainly for the jury: Who is Mr. George S. Keil?

A. George S. Keil is one of the men in our office.

Q. In San Francisco?

A. In San Francisco.

Q. In these policies particularly, Mr. Wentz, isn't it true that the general agents always sign and write the policies? No other agent in California but the general agent signs them?

(Testimony of Walter B. Wentz.)

A. No, that is not true.

Q. Didn't you tell the jury yesterday that the reason you sign these policies is that you may turn down the risk? A. Yes, sir.

Q. Under those circumstances isn't it true it always comes from your office?

A. In the case of the General Accident, yes.

Q. All right. I will confine all of this to the General Accident Fire and Life Assurance Corporation. Isn't it true—I am just assuming this; I don't know whether it is or not—. Isn't it true in these policies where you insure a man for ten, twenty, or thirty thousand, or fifty, or a hundred thousand public liability, [75] that policy is written, signed and sealed in your office in San Francisco, and it is sent to the dealer or the insured?

A. Yes.

Q. Well, I will show you this policy, Mr. Wentz, the policy immediately previous to the one in question, the one from December 16, 1938, to December 17, 1939. I will show you the policy and will ask you to state to whom that policy was sent after it was signed by Mr. Keil in your office under date of December 6, 1938? To whom was it sent?

A. I would imagine to Mr. Urquhart.

Q. Mr. Urquhart, yes. That is what I want to find out. So that if, as appears here, the bottom notation, or the paster, "In case of loss, removal, or any change"—

Mr. Scott: Just a moment. I object to the introduction here on the ground on which your Honor

(Testimony of Walter B. Wentz.)

has already ruled yesterday—that no authority is shown in Mr. Urquhart to attach any paster that might vary or tend to vary the instrument itself.

Mr. Goldstein: It has not been offered yet.

The Court: It has not been offered yet.

Mr. Scott: Why read it to the jury?

Mr. Goldstein: I am just asking questions——

Mr. Scott: Simply an artifice——

Mr. Goldstein: No, I am going to offer it, Mr. Scott, before I get through.

Mr. Scott: You have offered it, and——

Mr. Goldstein: And I will get it in regardless of your efforts.

The Court: Gentlemen, it is quite hard for the Court to hear both of you at the same time.

Mr. Goldstein: I beg your pardon, your Honor.

Mr. Scott: Pardon me.

Mr. Goldstein: All I am doing now is asking certain [76] questions in connection with the manner and form in which the policy got into the hands of the insured, Fereva.

The Court: It is recess time. Recess for 15 minutes, ladies and gentlemen. Remember the admonition of the Court.

(Recess.)

The Court: Will counsel stipulate all the jurors are present and in their proper places?

Mr. Goldstein: So stipulated.

Q. Mr. Wentz, my last question was: This policy was sent to Mr. Urquhart for delivery to Mr. .

(Testimony of Walter B. Wentz.)

Fereva; you don't know how this paster came to be put on the policy then? A. I do not.

Q. Now, you mentioned something about the General Accident claims department being in your office. That is correct, is it? A. Yes, sir.

Q. In other words, Mr. W. F. Murray, the manager of the claims department, has his office right in your own place of business of Wentz & Erlin at 206 Sansome Street? A. Yes, sir.

Q. In the Insurance Center Building?

A. Yes, sir.

Q. And as you told the jury yesterday, you didn't pay the salary of Mr. Murray, but it was paid directly by the General Accident? A. Yes sir.

Q. But his department was right there along with your office where you write these policies and send them out for the various companies, and from where you operated? A. Yes, sir.

Q. Now, is this true, as you testified a moment ago: that you didn't give any specific instructions to Mr. Urquhart as to what his duties were in connection with the General Accident Fire and Life Assurance Corporation, Ltd.?

A. Personally, I have given no instructions at all.

Q. Do you know of anyone who did in your establishment? [77]

A. I don't know of anyone who did.

Q. Then may I assume that you don't know what he did do in the field in connection with your company?

(Testimony of Walter B. Wentz.)

A. No; I think that is going a little too far.

Q. Well,——

A. I knew some of the things that he did, because they would come to my attention for one reason or another.

Q. Well, what was Mr. Urquhart's territory?

A. Well, it was Sacramento and the surrounding territory.

Q. Sacramento north, wasn't it?

A. Sacramento north.

Q. Up to the Oregon line?

A. No, we never went that far.

Q. Well, you have agents in Butte County, have you not? A. I believe so; maybe one.

Q. And you have agents in Colusa County?

A. Yes.

Q. Tehama County? A. Yes.

Q. Placer County? A. Yes.

Q. Yuba County? A. Yes.

Q. Sacramento County? A. Yes.

Q. And in all these territories Mr. Urquhart interviewed agents and solicited business in this territory, on which you receive the commission?

A. Who received the commission?

Q. You receive the commission?

A. You must understand this: that the large majority of the business that he got for the General Accident in that territory came from an entirely different source of production. Mr. Urquhart would have nothing to do with that part of the business at all.

(Testimony of Walter B. Wentz.)

Q. Regardless of the source of production, or the source of supply of these policies, your office received a commission from the General Accident Fire and Life Assurance Corporation, Ltd., on all policies written by you in behalf of that company.

A. Yes. [78]

Q. And as you testified yesterday, Mr. Urquhart was in your employ? A. Yes.

Q. And was in charge of the Sacramento office?

A. Of Wentz & Erlin.

Q. Of Wentz & Erlin, yes. And when you said that he solicited business, you mean he solicited the agents of your company, is that right?

A. Yes; and brokers.

Q. In other words, he didn't go out to meet any members of the jury or myself and say, "I want your business"? That wasn't his business, was it?

A. That was not his business.

Q. So he wasn't a soliciting agent in the sense of the term as applied to the ordinary agent that you designated to get business from the clients, and then having the policies written?

A. In that sense he was not.

Q. Mr. Wentz, you stated in answer to a question by Mr. Scott that the Mercantile of New York was fire insurance, also auto insurance, in connection with fire and theft, is that right? A. Yes.

Q. The Potomac Insurance Company was also fire and auto fire and theft? A. Yes.

Q. The Scotch Underwriters of Caledonia were auto only, as far as fire and theft? A. Yes.

(Testimony of Walter B. Wentz.)

Q. The United States Shippers were also auto for fire and theft? A. Yes.

Q. The Seaboard Company was a bond company, where you wrote bonds for various cases?

A. Yes.

Q. So that the only company that you had which insured for public liability, collision insurance, and property damage, was the General Accident Fire and Life Assurance Corporation, Ltd.?

A. That is subject to this one correction——

Q. All right, correct me.

A. The fire companies also wrote [79] collision insurance, but the General Accident was the only company which would issue a policy for liability for personal injury.

Q. All right. In order to get this matter straight, is this true: that the General Accident Fire and Life Assurance Corporation, Ltd., the plaintiff here, was the only company that you represented which wrote insurance for public liability—I will put it that way? A. Yes.

Q. In other words, the closures included in Exhibit No. 1 here, the policy of insurance in question?

A. Yes, sir.

Mr. Goldstein: That is all.

Mr. Scott: That is all, Mr. Wentz.

It is my understanding, your Honor, that counsel wishes to cross examine Mr. Fereva no further at the present time.

Mr. Goldstein: No further at this time.

Mr. Scott: The plaintiff rests.

(Plaintiff rests.)

Mr. Goldstein: Now, if your Honor pleases, in order to keep the record straight, I desire at this time to move the Court that the testimony which was elicited from Mr. W. B. Wentz yesterday afternoon under Section 2055, as far as it went, be made a part of the Defendants Dickinsons' case, and that it be considered so for all purposes. That will obviate the necessity of my going over the same ground.

Is that agreeable, counsel?

Mr. Scott: It is agreeable.

Mr. Goldstein: And in line with that, if the Court pleases, I desire to have the record show that the Defendants Charles Gromer Dickinson and Doris May Dickinson have introduced in evidence as exhibits thus far, Exhibit A, which is a certified [80] copy of the power of attorney of Wentz & Erlin as the general agents for the plaintiff corporation in California, dated the 12th day of May, 1931; as Exhibit B there was introduced in evidence a certified copy of the notice of appointment of L. K. Fereva as an agent for the plaintiff corporation, the General Accident Fire and Life Assurance Corporation, Ltd., Perth, Scotland; and as Exhibit C there was introduced in evidence——

The Clerk: We have no C.

Mr. Goldstein: Or we make, as part of our case, Exhibit No. 4 of the plaintiff's case, which I gave to Mr. Scott, which is a certified copy of the license issued by the Insurance Commissioner of the State of California on July 1, 1939, and ending July 1,

1940, which is the insurance agent's license required under the provisions of the Insurance Code.

The Court: Admitted.

The Clerk: Are you offering that as your exhibit?

Mr. Goldstein: Yes.

The Clerk: It is Defendants' Exhibit C.

(The document heretofore marked Plaintiff's Exhibit No. 4, was also marked Defendants' Exhibit C in evidence.)

Mr. Goldstein: If the Court pleases, at this time also, in view of the questions put by counsel to Mr. Wentz as part of his case, I offer in evidence the notice of appointment of Mr. L. K. Fereva by the Potomac Company, a certified copy of that appointment, which was objected to yesterday.

Mr. Scott: And again today, as irrelevant, immaterial and incompetent.

The Court: The objection is sustained.

Mr. Goldstein: Now, at this time, if the Court pleases, I desire to call Mr. W. B. Wentz, under Section 2055, as a witness [81] on behalf of the Defendants Dickinson, not being bound by his testimony, the same as under cross examination.

Mr. Scott: Might I so the record may be clear in the matter, ask also whether he is also called under that section as a witness on behalf of the Defendant Fereva and the Defendant Kemp?

Mr. Hogle: Yes.

Mr. Goldstein: I assume that will apply to Mr. Fereva.

Mr. Scott: And how about the Defendant Kemp?

Mr. Goldstein: Yes; so understood.

WALTER B. WENTZ,

recalled for the Defendants; under Section 2055 C.C.P.; previously sworn.

Direct Examination

Mr. Goldstein: Q. Mr. Wentz, under date of December 5th you were served with subpoena duces tecum issued out of this court, and I believe you were served by the United States Marshal of San Francisco, to produce——

Mr. Scott: Just a moment. He was served.

Mr. Goldstein: Yes; to produce certain records in connection with the account of your firm with Mr. L. K. Fereva.

Q. Have you those records with you?

A. Yes, sir.

Q. First of all, Mr. Wentz, I will ask you to state to the jury as to what you mean by a soliciting agent.

A. I distinguish between the soliciting agent and the general agent, that the one solicits the contract, and the second one concludes it—the general agent concludes it.

Q. Well, as far as you are concerned, Mr. Wentz, is there any difference between a soliciting agent and an agent of the plaintiff corporation?

A. Well, there is a difference. We call one [82]

(Testimony of Walter B. Wentz.)

kind of an agent a local agent; another agent is a special agent. An agent is a general term.

Q. All right.

A. The general agent is an agent.

Q. I understand—when you speak of a general agent, you mean a person in your position, holding a power of attorney for the corporation, to sign the policies and receive services of summons and complaints after suit, is that right? A. Yes.

Q. But there is no difference in your appointments between a soliciting agent and the one who makes contracts, isn't that true?

A. There is this: When we appoint a soliciting agent we may have no written contract with him.

Q. Do you ever appoint a soliciting agent?

A. You have to appoint them, under the law as it has been explained to me.

Q. Do you appoint them as soliciting agents, or as agents?

A. We appoint them, in my understanding, as soliciting agents.

Q. Well, Mr. Wentz, take a look at this appointment you signed under your own hand and seal on the 1st day of July, 1937, and tell the jury, if there is a difference between a soliciting agent and an agent, why you didn't appoint Mr. Fereva as a soliciting agent rather than as an agent, as under your appointment.

A. Because there is no provision in law which would set up any different procedure. Whether I

(Testimony of Walter B. Wentz.)

want to appoint a soliciting agent, or general agent, or what-not it might be, I have to fill out that form.

Q. That is true. That is what I am trying to get at. Isn't it true that in order for you to appoint an agent for your company under your power of attorney and under the Insurance Code, you would have to appoint him an agent without qualification, as you did here?

A. That is a matter of law.

Q. I am asking whether you did that, Mr. Wentz.

A. Yes, I signed [83] that form.

Q. And the form you signed was that you appointed Mr. L. K. Fereva as your agent within the State of California, at Lincoln, California. That is the way you filled it out. Have you the record of the policies that were written by you for Mr. Fereva during the period stated in the subpoena?

A. I am not sure of the period stated in the subpoena, but I have here the original loose ledger sheets from the Wentz & Erlin ledger, which runs from sometime in 1934 up until today.

Q. Very well. May I see that, sir?

A. (Witness hands documents to Mr. Goldstein.) Attached to that is my record of his appointment as an agent.

Q. Now, you have handed me, sir, a number of ledger sheets starting in with April, 1935.

A. I think it runs back to December, 1934, on some of it.

(Testimony of Walter B. Wentz.)

Q. This is the first year, is it not (exhibiting document to the witness)?

A. Look on the back.

Q. On the back. Pardon me. Just a moment. Yes, December, 1934. A. December, 1934.

Q. December, 1934, running along down to 1940, is that correct?

Mr. Scott: I think that is correct, Mr. Goldstein.

Mr. Goldstein: Down to 1940?

Mr. Scott: Yes. I think he ceased to be an agent in 1940.

Mr. Goldstein: Yes. This ledger sheet——

Mr. Scott: Pardon me. Might I make a suggestion and a request, your Honor, coupling the two together? For the reason that this is the original, and sole and only record of the company's business during the period of these years, and for the reason that we are all the time required to respond to State and Federal authorities by having these in our custody, might I respectfully [84] suggest and request that counsel read into the record the items as to each policy which he considers material, and that Mr. Wentz be allowed to preserve his records and take them back with him? I make that suggestion because they are not very numerous, although the sheets are rather large.

The Court: Will that be agreeable?

Mr. Goldstein: I have no objection at all, Mr. Scott, except it will be a tedious proposition, and I will give an alternative suggestion, your Honor,

(Testimony of Walter B. Wentz.)

that we offer in evidence the account with the privilege of withdrawing the same immediately at the conclusion of the case, after the reporter has had an opportunity of copying the record. I think that will be far better, because otherwise I will have to read all these policies, and they run into a considerable number.

Mr. Scott: The point is that even taking them from that date, over a period of ten or more years, they don't run into a considerable number. In other words, from this one sheet there are about twelve——

The Court: Mr. Goldstein, read them into the record.

Mr. Goldstein: Very well.

Q. I notice that you have, on December 24, 1934, you carried over an account here of a balance due of \$451.10. I take it that that is from the account of the previous years, is that correct?

A. I would say so.

Q. Yes. And this account that you have here starts in with December 24, 1934, policy issued to L. K. Fereva, No. 888, \$95.74, liability, 20 percent. Does that mean the commission? A. Yes.

Q. That means the commission on that?

A. Yes, sir.

Q. January, 1935—November 24th, Policy No. 533282, Bessie K. Fereva, an endorsement, "No premium"; November 24, 1935, an [85] endorsement to James R. Smith, no premium; on January 25th, Policy No. 85084 and 14102, L. K. Fereva,

(Testimony of Walter B. Wentz.)

fire and theft, \$2.01; and on January 7th another policy, 85084, 14118, \$1.00; February, 1935, Policy No. 85084-14122, L. K. Fereva, \$1.00; 85084-14123, ditto, \$1.00; 85084-14121, L. K. Fereva, \$1.45. These small amounts, Mr. Wentz, that I just read, are coverages for about a day, or portions of a month, is that right?

A. I might answer you if I could see that sheet.

Q. Yes, I will be glad to show it to you. Just tell the jury what those coverages are, for a dollar, or a dollar and forty cents.

A. They have to do with automobile fire insurance altogether, and might be anything; might be addition of comprehensive coverage; might be anything. I can't verify it.

Q. Or it might be coverage or insurance for a day, or two days?

A. Yes.

Q. Depending on how long the coverage was on?

A. Possibly might be. I wouldn't be personally familiar with those automobile fire policies, anyway.

Q. March 22nd, Policy No. 53283, James R. Smith, liability, 20 percent, \$21.85; property damage, 25 percent, \$5.00; collision, 30 percent, \$23.75. When I say liability, that means the commission that was paid to Mr. Fereva?

A. When you say 20 percent——

Q. That is what I mean, when I say 20 percent—when I say liability 20 percent. The property damage, of course, is a different item, and the collision insurance?

A. Yes.

(Testimony of Walter B. Wentz.)

Q. March 3, 1935, Policy No. 984, L. K. Fereva, property damage, \$145.08. That, I take it, is a property damage policy? It is under "Property Damage."

A. May I see that?

Mr. Scott: Mr. Goldstein, might I ask if this J. R. Smith, was he at that time a partner of Fereva? [86]

Mr. Goldstein: Was he?

Mr. Hogle: What?

Mr. Goldstein: James R. Smith, was he a partner of Fereva?

Mr. Hogle: No.

Mr. Goldstein: No.

The Witness: No; that is under the property damage head, but I think the intention is to put it under the 25 percent commission head, because it is a fire policy; it is a Mercantile fire policy.

Mr. Goldstein: Q. At any rate, that policy was issued to James R. Smith?

A. You are talking about the one to Fereva?

Q. I mean to Fereva, with the premium on it of \$145.08.

A. I think that was a fire policy.

Q. Now,—

A. Policy No. 982, L. K. Fereva, yes.

Q. \$59.08 under liability, 20 percent. That is a liability policy?

A. I am not sure.

Q. Yes, it is. He gets a commission of 20 percent, see?

A. Yes.

Q. March 14th, Policy No. 10329-S, L. K. Fereva, Fire and Theft. It is marked 15 percent, \$5.27.

(Testimony of Walter B. Wentz.)

That means there is a policy for fire and theft, and his commission was 15 percent, is that right?

A. Apparently so.

Q. Isn't it so? Not apparently. Take a look at it.

A. I am in rather deep water when it comes to keeping books.

Q. I am not asking you about bookkeeping, Mr. Wentz. I am asking you about the premium on insurance put on your books, and the commissions paid to Mr. Fereva from your office.

A. Where is it?

Q. March 14th (indicating).

A. \$5.27 fire and theft?

Q. Yes, under the 15 percent item. That means he gets a commission [87] of 15 percent on that item, isn't that right?

A. That is what it means.

Q. March 14th, L. K. Fereva, liability, 20 percent; it is No. 888, L. K. Fereva, \$66.22 under liability, and \$62.64 under property damage. That means that on that premium he gets 20 percent under liability and 25 percent on the property damage?

A. Yes.

Q. Policy No. 23326, R. & S. Garage, liability, 20 percent, \$17.25, property damage, \$5.00. That is under that column (indicating). In order to save time, whenever I say "liability 20 percent," that means that the commission is 20 percent?

A. Yes.

(Testimony of Walter B. Wentz.)

Q. If I say "property damage," that means 25 percent; and if I say "fire and theft," that is 15 percent. Those are the commissions paid under these columns.

A. It would seem so.

Q. September 12, 1935, Mercantile Fire, premium, \$118.30. Just what does that mean, Mr. Wentz? I have never seen these records before, and I am not entirely familiar with them.

A. I don't see it.

Q. On the right-hand side there (indicating).

A. Oh, this up at the top, huh?

Q. Yes.

A. December—I don't see that.

Q. Right here (indicating). It says, "Mercantile Fire, December 12, 1935, \$186.20."

A. That looks to me very much like—I can't figure that out at all, what it means. As a matter of fact, it is listed over—that premium, apparently, \$186.30, should have been charged to General Accident. Wait a minute, wait a minute; now, wait a minute. That is Policy No. 888, Mercantile Fire. He has got it under liability and property damage.

Q. Uh-huh (affirmative).

A. Well, the only way I can explain that item is that these columns are not intended so much to refer to the liability and the property damage as they are to the amount [88] of commission, and the accountant would put it in the column which applied to the amount of commission that Fereva would get.

(Testimony of Walter B. Wentz.)

Q. So that the items on the right-hand side would be the total of the commission?

A. Yes, and these items would not necessarily mean, by putting them in that column, that they covered liability or property damage, but would only have reference to the fact they were subject to these commissions.

Q. So that this item of September 12, 1935, of \$186.30, shows that he received a commission of 20 percent on \$95.74, and 25 percent on \$90.56?

A. Yes; and apparently they were straight fire insurance.

Q. Now then, going to the next stage: March 15, 1935, Policy No. 999, L. K. Fereva, property damage, \$72.54 in the 25 percent commission column. That is a policy which was issued on which he got 25 percent? A. Yes.

Q. And on the same date, Policy No. 85084, fire and theft, 15 percent, \$2.86. In April, 1935, again Policy No. 85085-14125, L. K. Fereva, \$1.00, under fire and theft. March 15, 1935, Policy No. 984, L. K. Fereva, property damage, \$145.08. That is under 25 percent commission. That would mean he got a commission of 25 percent on that?

A. Yes.

Q. May, 1935—May 10th, Policy 321198, L. K. Fereva, compensation, \$38.00. There was a commission on that he also received on the compensation insurance?

A. He should have got 10 percent. Is there a column for 10 percent?

(Testimony of Walter B. Wentz.)

Q. There is no column mentioned here as to commission, but I understand he did get a commission on these compensation policies, also? That would be 10 percent? A. Yes.

Q. May 10th, Policy 85085-14127, L. K. Fereva, fire and theft, \$1.86. May, 1935, dated 2-23, Policy No. 85084-14130, L. K. Fereva, [89] \$1.00, fire and theft. March 28th, Policy 85085-14132, L. K. Fereva, fire and theft, \$1.00. The same date, Policy 85084-14133, L. K. Fereva, \$1.00, fire and theft.

Mr. Scott: Would your Honor forgive me if I looked over counsel's shoulder?

Mr. Goldstein: No objection at all.

Mr. Scott: I just wanted to check something that occurred to my mind.

Mr. Goldstein: No objection at all.

Mr. Scott: Might I interpolate a question with a view to straightening a difficulty in my own mind, and it possibly may help us along?

Mr. Goldstein: I have no objection.

Mr. Scott: Q. Mr. Wentz, taking for example in April of 1935, and in May of 1935, I notice a column, "Assured, fire commissions, L. K. Fereva," running down through the two months. Now, does that mean that the policy is to Fereva himself as the assured?

A. That would mean that Fereva was the insured, yes.

Q. Now, another question. I think we can save a little time.

Mr. Goldstein: Very well.

(Testimony of Walter B. Wentz.)

Mr. Scott: Q. I notice here that in the month of April there is "L. K. Fereva, 85084-14120, L. K. Fereva, \$2.85," then across is Merchants Automobile," then the entried of \$1.00 premium. In the next line there is the same number, \$85084," ditto——

Mr. Goldstein: No; it is "14125."

Mr. Scott: Yes, with a new number in extension, "14125"—I am awfully bad at figures, bad in keeping accounting books, and possibly keeping money——

The Court: That is very odd for a Scotchman.

[90]

Mr. Scott: Scotchmen are very much out of form at this. Now, there is in extension an entry of \$1.00, which is carried across. Now, in May we have one, two, three items of a dollar, all having this controlling number, 85084.

Mr. Goldstein: And 85.

Mr. Scott: And 5.

Q. Now, may I ask you, does that refer to one policy to Fereva going through the months covering his business as an auto dealer, and are those charges as cars move, come in and out under the coverage? A. I would think so.

Q. Isn't that the explanation?

A. I would think so, yes.

Q. In other words, it doesn't mean there are different policies represented by each item, but the item is a broad coverage. Have you a form which you used, Mr. Goldstein?

(Mr. Goldstein hands document to Mr. Scott.)

(Testimony of Walter B. Wentz.)

Mr. Scott: Q. Might I ask, Mr. Wentz, is it not true that some of these policies are upon an estimated premium which is based upon the volume of business done by the assured?

A. Yes—no—that is—as to this—I am trying to give an understandable explanation of these items. I am of the opinion that they mean this: that with most business we do in the Mercantile insurance Company, auto department, we must have issued to Mr. Fereva what we call a dealer's open policy, whereby we insure against fire insurance the cars on his floor, adding and subtracting as they were added on, and making these charges for the days they were in effect.

Mr. Goldstein: Q. Let me show you that is incorrect, Mr. Wentz, with one item here. I will take June 22——

Mr. Scott: This is the item we are referring to (indicating).

Mr. Goldstein: No, but he said that is a general thing. [91]

Mr. Scott: Yes, but this is——

Mr. Goldstein: Now, as a matter of fact, these dollar items here, isn't this true, that if a man, let us say, puts on coverage on an automobile today for fire and theft—let us say puts on coverage, and he notifies you, but before you have a chance even to issue the policy he sells the car and he charges for the fire and theft insurance from the day he covered it, up to the time it moves out of the place, let us say three days, five days, or two weeks, he receives the premium?

(Testimony of Walter B. Wentz.)

The Witness: How do you mean, he received the premium?

Mr. Goldstein: Q. I mean he pay for the premium?

A. That is correct.

Q. In other words, he never got the policy, but he was covered in the meantime?

A. That would only apply to an automobile dealer.

Mr. Scott: Q. That means, as you say, there was one dealers policy to which all these minor——

A. ——items apply. I think that is so.

Mr. Goldstein: Q. Isn't it a fact these are different policies and different numbers? To show you it doesn't apply, as you say, to one policy, here is No. 14127, \$1.86; 14130, \$2.00; 14133, \$1.00. Why would there be different numbers if it is all one policy?

A. Aren't those numbers prefaced by one number?

Q. No, sir.

Mr. Scott: Just a moment, now, let's see if they aren't.

Mr. Goldstein: There is 85084-14127, L. K. Fer-eva, \$1.86.

Mr. Scott: What is the next number?

Mr. Goldstein: No. 85084-14130, \$1.00.

The Witness: That 85084 seems to follow right on through.

Mr. Goldstein: Q. Let's take the next, 85085-14133, \$1.00. [92] Is there one policy, or more than

(Testimony of Walter B. Wentz.)

one policy? Or isn't it a fact it is interim coverage for the few days that Mr. Fereva covered that car for the time being, and paid you the portion, whatever it was? A. Let me look at that again.

Q. Yes, sir (exhibiting document to witness).

A. I would say it was the one policy, and that there has been a clerical error here, such as we find as we go further on down. That 85084 seems to be pretty consistent. There is only one instance they made it 85085. I think that is simply a clerical error.

Q. So you say your record is in error, is that it?

A. I think so.

Mr. Goldstein: There is one further question I wish to ask before we adjourn, your Honor.

Q. There is one dated June 22, Policy No. 34375, Charles Brockman, liability, 20 percent, \$19.00; property damage, 25 percent, \$5.00; collision, 30 percent, \$17.00; making a total premium of \$41.00. Now, that was issued to Mr. Brockman, and on that policy Mr. Fereva received those various commissions? A. Yes, sir.

Q. That is correct, isn't it?

The Court: Ladies and gentlemen, we will recess until two o'clock this afternoon. Please remember the admonition heretofore given you by the Court.

(Thereupon a recess was taken until 2:00 o'clock p. m.) [93]

Afternoon Session

2:00 o'clock P. M.

The Court: Will counsel stipulate the jurors are all present?

Mr. Goldstein: So stipulated.

Mr. Scott: Yes, your Honor.

WALTER B. WENTZ,

Resumed.

Direct Examination (resumed)

Mr. Goldstein: Q. My last question just before the noon recess related to this Policy No. 34375, Charles Brockman, dated June 22, 1935, liability, 20 percent, \$19.00; property damage, 25 percent, \$5.00; collision, 30 percent, \$17.00, and marked "General." That means the General Accident, doesn't it? A. Yes, sir.

Mr. Goldstein: Your Honor, in order to save time I am going to ask Mr. Scott to stipulate to the number of these insurance policies that were issued on which commissions were paid, and I will be content with that.

Will you count these with me, Mr. Scott?

Mr. Scott: If your Honor pleases, I made an analysis during the noon recess, and I would make this suggestion—I have had somewhat more experience in insurance matters than my friend——

Mr. Goldstein: I will concede that.

Mr. Scott: ——but I myself am no expert; but if Mr. Wentz and Mr. Goldstein and I could take

(Testimony of Walter B. Wentz.)

just a few moments I can show this: Starting in January—if counsel will follow—January, 1935: In that month one policy was issued in the Mercantile Auto; February of 1935, no new policy was issued; charges were made upon the garage—the dealer's policy; in March one new—two new policies issued, No. 983, 103298, both in the Merchants Auto; in [94] April there was one policy, the 10th, 3361, in the Merchants Auto; in May, one policy, 321198, in the General. All of those policies up to date were issued to Fereva. In July of 1935—

Mr. Goldstein: Just a moment, Mr. Scott; you overlooked the policy to James R. Smith in March, 1935, in the General, on which the premium was credited and paid, public liability and property damage.

Mr. Scott: That was a debit. It was returned and cancelled. That was a policy existing before January, 1935.

Mr. Goldstein: However, it was a policy issued—

Mr. Scott: No, it wasn't issued in that month. It is cancelled off.

Mr. Goldstein: Will you stipulate it was issued prior to the time—

Mr. Scott: Yes; prior to 1935, and cancelled off.

Mr. Goldstein: That is satisfactory.

Mr. Scott: July, 1935, two policies, in the General and Potomac, were issued to Charles Brockman—no, one policy; there are two charges.

Mr. Goldstein: Yes.

(Testimony of Walter B. Wentz.)

Mr. Scott: In August policies were issued to J. O. Hoff, and to Roy Vance, both in the Merchants Auto. Policy to O. K. Semeron in K. A.

Q. Might I ask you what the initials "K. A." stand for? A. What is that?

Q. K. A.

May I show that to him?

Mr. Goldstein: Yes.

Mr. Scott: Q. That was in August. "O. K." or "O. E. Semeron, K. A." What does that mean?

A. You have got me; I don't [95] know.

Mr. Goldstein: Well, let's pass it, Mr. Scott, for the sake of time. I will not insist upon it. Let's pass it.

Mr. Scott: In September, the next month, a policy was issued to N. A. Gunnion in the Merchants Auto, and W. H. Hanneman——

Mr. Goldstein: Harmon.

Mr. Scott: H-a-r-m-o-n, in the Merchants Auto, and E. E. Fuller, in the Merchants Auto——

Mr. Goldstein: No; E. E. Fuller is in the General.

Mr. Scott: In the General.

Mr. Goldstein: Yes. Liability, \$19.00; property damage, \$5.00; collision, \$21.00.

Mr. Scott: Pardon me. E. E. Fuller in the General. Mrs. Agnes Baker——

Mr. Goldstein: Yes, Mercantile.

Mr. Scott: ——in the Mercantile.

Mr. Goldstein: And E. E. Fuller again.

(Testimony of Walter B. Wentz.)

Mr. Scott: E. E. Fuller again—it is the same policy, you will notice.

Mr. Goldstein: Yes; it is in the Potomac——

Mr. Scott: That was in the Potomac, not the General. It was first put in the General.

Mr. Goldstein: No, it is a different policy. The first policy to Mr. Fuller, 3461—this is fire and theft—there was no fire and theft on the——

Mr. Scott: Q. That is a combination policy, is it not, Mr. Wentz? A. What policy?

Q. The General and Potomac issued a combination policy, did they not?

A. Yes, combination.

Mr. Scott: So it is one policy. In October, no policies. In [96] November, Policy 23442——

Mr. Goldstein: L. K. Fereva.

Mr. Scott: Again to Mr. Fereva in the Merchants Auto.

Mr. Goldstein: No, no, wait a minute—General, liability, \$153.50; property damage, \$30.00. It is in the General.

November 24th, Policy No. 23443, L. K. Fereva, liability, \$153.50; property damage, \$30.00, in the General.

Mr. Scott: In the General. Now, might I summarize, with counsel's consent, that in the year 1935, one, two, three, four policies were issued through the Fereva agency in the General, and in the cases of Fuller and Brockman they were issued to people other than Fereva, and the others were to himself?

(Testimony of Walter B. Wentz.)

Mr. Goldstein: There is one other, in November—J. S. Hoff, collision insurance.

Mr. Scott: That is a cancellation. When they appear there in the red, counsel, we are in the red. That is one thing about bookkeeping I do know.

Mr. Goldstein: I have no objection to that, counsel.

Mr. Scott: In 1936: In January there was a policy in the Merchants Auto. February, a policy to H. S. Kuckram in the Merchants Auto. In March, two policies, to Fereva in the Merchants Fire, and one policy to Ishor Sigh—probably an Irishman—in the Merchants Auto.

Mr. Goldstein: Are you sure he wasn't a Scotchman?

Mr. Scott: He might be a Scotchman; I don't know.

The Court: May I suggest, Mr. Scott, we have several Irishmen on the jury.

(Discussion.)

Mr. Scott: In April, F. A. Warren, in the General. In May, L. K. Fereva in the General, this being a renewal, or a new [97] dealers policy; and in May, Fereva in the Merchants Auto. In June, Mrs. Florence Christianson in the General. In July—

Mr. Goldstein: Just in order to get that clear, Florence Christianson is for liability and property damage in the General.

Mr. Scott: Yes, in the General.

Mr. Goldstein: There is another policy in June to Mr. Fereva, a compensation policy.

(Testimony of Walter B. Wentz.)

Mr. Scott: Yes. In July, Fereva, collision, in the Merchants Auto. And Archie J. Christianson in the General.

Mr. Goldstein: That is also for liability and property damage.

Mr. Scott: Yes. In August, O. E. Semeron, in the Merchants Auto.

Mr. Goldstein: Collision.

Mr. Scott: And Fereva in the Merchants Auto.

Mr. Goldstein: That is fire and theft.

Mr. Scott: Yes, that is fire and theft. In September, no policies. In October, C. A. Olsen in the General.

Mr. Goldstein: Liability and property damage.

Mr. Scott: In November, no policy; and in December, a policy to Fereva in the Merchants Auto, and one covering the R. & S. Garage in the General, liability, \$125.45; property damage, \$26.50. And the General were liability, rather than fire and theft.

So to summarize, in the year 1936, one, two, three, four, five policies were issued in the General to persons other than Fereva.

In 1937: In the month of January, 1937, no policy. In February, Policy No. 103167, insuring the Fereva Chevrolet Company in the Merchants Auto. In March, two policies in the Merchants Auto for L. K. Fereva and one for O. E. Semeron.

[98]

Mr. Goldstein: One of those policies is for liabil-

(Testimony of Walter B. Wentz.)

ity, and one for property damage, and these two policies to Fereva, 301 and 302.

Mr. Scott: Yes. They were, however, in the Merchants Auto, and not the General.

Mr. Goldstein: Yes.

Mr. Scott: April, no policies. May, Policy No. 353042, L. K. Fereva, insured in the General, and a policy to F. A. Warren, insured in the General.

Mr. Goldstein: That is for liability and property damage.

Mr. Scott: That is for liability and property damage. In June, no policy. In July, A. J. Christianson, in the General.

Mr. Goldstein: Policy No. 10301, in June.

Mr. Scott: That is the continued coverage on the garage he had above.

In August, L. K. Fereva, in the Merchants Auto.

Mr. Goldstein: Fire and theft.

Mr. Scott: September, October and November, no policies. In December——

Mr. Goldstein: Just a minute——

Mr. Scott: The next is December, 991200, L. K. Fereva, liability, in the General, and at the same time a policy in the Merchants Auto.

Mr. Goldstein: Just a minute. In order to keep this record straight, on this Policy 991200, on the liability, on the basis of 20 percent, \$112.16 is the premium, and on the property damage, on the basis of 25 percent, \$26.50 is the premium. That is the policy you just mentioned.

(Testimony of Walter B. Wentz.)

Mr. Scott: And on that policy, please note, and on all of the policies, apparently Fereva got the agent's commission. [99]

Mr. Goldstein: Yes.

Mr. Scott: That is somewhat flagrantly in the face of a certain statute, the commission paid Fereva.

Mr. Goldstein: We aren't concerned with that. I just want to have the record show there was that policy of December, 1937, and another policy, 105431, fire and theft and collision, in the Mercantile, also in the percentage column for commission. That is in December, 1936.

Mr. Scott: To summarize: In the year 1937 three policies—four policies were taken out in the General by Fereva; three of them were for persons other than himself. In 1938: In January a policy to Ralph Burgess in the Merchants Auto; one to Savage in the Merchants Auto. February, nothing. In March, one for the Dalton Motors, Inc., in the Merchants Fire, to Fereva in the Merchants Fire, and one to Alvio Galvianni, which is in the New General. Pardon me——

Q. What is meant, Mr. Wentz, by this entry, "New Gen."? Would that be a new policy in the General?

A. I would say a new policy in the General Accident.

Mr. Scott: In April, no policy whatever. In May, Policy No. 371980, L. K. Fereva, insured in the General. June and July, no policy.

(Testimony of Walter B. Wentz.)

Mr. Goldstein: There is one policy in July.

Mr. Scott: You notice that is an audit.

Mr. Goldstein: Pardon me.

Mr. Scott: In August, no policy. In September, a policy to L. K. Fereva, insured in the Merchants Auto. October and November, no policy. And in December there is an entry, "Fereva Chevrolet Company," with the notation, "non-reward."

Q. What does that mean, Mr. Wentz?

A. Well, that was to [100] distinguish between a policy written with a safe driver reward and without it, to distinguish between the matter of commissions.

Mr. Scott: Now, on that policy there is no entry then, as to the company in which that is written. That would be in what company?

Mr. Goldstein: That is the General.

The Witness: That was the—that is his garage policy, his garage liability policy.

Mr. Scott: Q. Would that be in the General?

A. That would be in the General Accident, yes.

Mr. Goldstein: This policy that you just referred to, December 16, 1938, I want to get the number—991262—December, 1938, 991262, liability, \$126.11; and property damage, \$26.50, included in the items of 20 percent for liability and 25 percent for property damage; and that is in the General.

Mr. Scott: Now for the next year, in 1939: In January, Policy No. 13027.

Mr. Goldstein: No. 13027.

Mr. Scott: To Fereva Chevrolet Company, in the General. February, no policy. March, two policies,

(Testimony of Walter B. Wentz.)

to Fereva, in the Merchants Fire. April, no policy. May, Policy No. 391987, Fereva, in the General. June and July, no policy. August, O. W. Campbell—

Mr. Goldstein: Liability and property damage.

Mr. Scott: Was not taken, so we cross that one out. In August, that same month, three policies to L. K. Fereva in the Merchants Auto. September, one policy to the same, in the Merchants Auto. And October and November, no policies. And in December—

Mr. Goldstein: Just a minute. November, 1939, there is one here, G. W. Campbell. [101]

Mr. Scott: Those are cancellations; again we are in the red ink. You see this cancellation?

Mr. Goldstein: All right, I will let it go.

Mr. Scott: We will let it go.

Mr. Goldstein: December.

Mr. Scott: December 16, Policy 1556—

Mr. Goldstein: Liability—

Mr. Scott: Fereva Chevrolet Company, non-reward.

Mr. Goldstein: That is in the General; I have the policy here.

Mr. Scott: I assume that would be the General.

Mr. Goldstein: That is the General; I have the policy here. Liability, \$102.90, and property damage, \$29.50, under these respective columns.

Mr. Scott: So that to go back to 1939—and it will be noted, and I assume stipulated, that in the year 1939 Fereva obtained no policy whatever with

(Testimony of Walter B. Wentz.)

any of the companies in the name of any insured other than himself and the Fereva Chevrolet Company. The only policy was that of Campbell, which was issued and cancelled. In 1940: In January and February, no policies. In March, Policy 6570 and 6569, L. K. Fereva, insured in the Merchants Fire. In April, no policy. In May, a policy to L. K. Fereva in the General. In June, no policy. July, no policy. In August, a policy, Fereva again the insured, in the Mercantile.

So that, to summarize: In the year 1940 Fereva wrote only one policy in the General, and in all the policies that were written he himself was the named insured, and further, from the year 1935 to the year 1940 the record shows that Fereva wrote nine policies in the General for people other than himself——

Mr. Goldstein: For my purposes—— [102]

Mr. Scott: ——a period of six years.

Mr. Goldstein: For my purposes I will take the figures given.

Mr. Scott: I will state I spent the entire recess in checking, and I believe the figures are correct.

Mr. Goldstein: Q. Mr. Wentz,——

Mr. Scott: Will you show me those papers? I might stipulate.

Mr. Goldstein: Yes. I have the file that you produced in answer to the subpoena duces tecum. handed me so kindly by Mr. Scott.

(Testimony of Walter B. Wentz.)

Q. These papers that you brought up in connection with the correspondence pertaining to Mr. Fereva—you have an inter-communication system between Mr. Urquhart and your office, do you not? In other words, you write notes back and forth, or he would give notes to you? A. Yes.

Q. I will show you one, for instance, dated October 25, 1935, by Mr. R. F. Urquhart. That is his handwriting, is it not?

A. I am not familiar with his handwriting.

Q. You are not familiar with it?

A. It seems to be addressed to Mr. Brown.

Q. Do you know Mr. Brown?

A. Mr. Brown is in my employ.

Q. Did you say now you aren't familiar with Mr. Urquhart's handwriting?

A. I am not personally familiar with it. I take it for granted it was his communication.

Mr. Goldstein: I simply offer it for identification.

(The pencil memorandum referred to was marked Defendant's Exhibit D for identification.)

Mr. Goldstein: Q. I will show you a copy of a statement of the General Accident Fire and Life Assurance Corporation, Ltd., being made out to you, Wentz & Erlin, and sent to Mr. Fereva for one of the policies—let's see; this one shows for 1937—and [103] see if you can identify that.

Mr. Scott: I might respectfully suggest, your

(Testimony of Walter B. Wentz.)

Honor—I don't know whether counsel has noted it—but this policy has to do with workmen's compensation——

Mr. Goldstein: No; it is auto sales and garage, it is right on top of it. That is what I am getting at. It is auto sales and garage, and the premium on it——

Mr. Scott: Oh, yes, I see.

The Witness: Just what is it you want me to do with respect to this paper, Mr. Goldstein?

Mr. Goldstein: Q. Is that a copy of the formal statement which you sent for policies that were issued to him in the General Accident?

A. No; this form is issued by the corporation to our agency.

Q. I see.

A. It undertakes to set out the fact that we had carried this garage liability policy for the Fe-reva Chevrolet Company from November, 1935, to 1936, and that it had earned a certain premium during that time. That premium had been obtained—those figures had been obtained by an auditor who was employed by the corporation, and he had set them up in his report to the corporation; the corporation had accepted those figures and sent us this paper from Philadelphia to set up as a charge on their books. It so happens that this makes no charge, because the calculation indicates that the advance premium had taken care of the situation.

Q. At any rate you have here—this shows that it was based upon the payroll of his garage?

(Testimony of Walter B. Wentz.)

A. On the payroll, yes.

Q. Now, I am going to show you a letter dated January 14, 1938, from Mr. R. F. Urquhart, addressed to Mr. George Keil, care of Wentz & Erlin, and ask you to state whether that letter was written on your stationery, and whether you recall that letter? [104]

A. I would not personally recall it, but it seems to be something that would be in the ordinary course of business. It is written on the letterhead provided for Mr. Urquhart's use, and it is addressed to our office manager.

Q. Well, Mr. Wentz, am I to understand that you have never seen these letterheads that were used by your office?

A. I didn't say I haven't seen them.

Q. Did you ever see, on this letterhead, "R. F. Urquhart, Resident Agent, Sacramento District Office, Ochsner Building, 719 K Street, Sacramento, California"?

A. Yes, I have seen that; yes.

Q. You have seen it? A. Yes.

Q. Now, you have stated Mr. Urquhart didn't have any duties. Isn't it a fact that in this letter he made certain suggestions about removing the office from where you were located in Sacramento to some other place?

A. I haven't read the letter.

Mr. Goldstein: If the Court please, I am going to offer in evidence that letter as bearing upon the duties and also the authority of the man who ap-

(Testimony of Walter B. Wentz.)

appears on there as the resident agent, a letter addressed to his employers, Wentz & Erlin.

Mr. Scott: I object to it as irrelevant, incompetent and immaterial, so far as the issues in this case are concerned.

Mr. Goldstein: I also want to offer it in evidence to show the letterhead with his title on it.

Mr. Scott: That is a letter written in 1938, and has to do with the change of location in the office, and has to do with a fire. I can't see how even in the remotest degree the letter could have anything to do with the issue of whether Mr. Fereva gave notice. This is a communication from our agent up here, who seems to have been in trouble and wants to change the location. As far as the letterhead goes, I have no objection to that. [105]

The Witness: Pardon me, Mr. Scott, but that letter is new to me; the first time I have seen it. But it seems to me to have been written about the removal of the location by a man by the name of Frisbee, who has a garage policy with us, A. G. 991000.

Mr. Goldstein: That is still more important. That is exactly why I want to offer it. May I show the letter to your Honor?

Mr. Scott: Will you continue, Mr. Wentz?

The Witness: My explanation of the letter?

Mr. Scott: Yes. What he wants now is to have the policy covering the location that was burned changed to the new location, is that it?

The Witness: I would judge from that letter

(Testimony of Walter B. Wentz.)

we had issued a policy to a man named Frisbee, and that Frisbee had a fire on his premises and was changing the location, and Mr. Urquhart was writing in to my office, but addressed to the office manager, Mr. Keil, on the subject of endorsing that policy to change the location, which was an endorsement we would have to execute in our office in San Francisco.

Mr. Scott: Q. In other words, Urquhart had no authority to issue it himself?

Mr. Goldstein: Just a minute, Mr. Scott. If you want to testify, I will let you take the stand any time you want, and I will cross examine you.

Mr. Scott: I am at your service any time you want.

The Court: I would like to have it quiet so I can read the letter.

Mr. Goldstein: I beg your pardon, Judge.

The Court: This letter seems to deal with a fire and the matter of a new location for Frisbee. What is your purpose in offering it? [106]

Mr. Goldstein: My purpose, your Honor, first of all, is to show that he was dealing for Wentz & Erlin in their employ, and show his title on this one, as resident agent, and then show the change—this is January 14, 1938—and I will have some other letters here later on to show he was district representative. In other words, the title is on the letterhead.

The Court: Is there any question about that?

Mr. Scott: Not the remotest question about that.

(Testimony of Walter B. Wentz.)

That has been the testimony of Mr. Wentz, and would be that of Mr. Urquhart.

The Court: That is already admitted, as I understand the testimony given here.

Mr. Goldstein: But your Honor, I have to show the extent of his authority in order to prove ostensible agency, and the best evidence is what he did for this firm.

Mr. Scott: May I point out that what he did for this firm, Frisbee, is this: Frisbee, being in trouble, having been burned out of one place and having to go to another, he, for Frisbee, writes in to the company and asks the company to transfer the policy to a new location. It is purely the act of an agent or company representative here, who had no authority to do it himself, so I submit the matter is not competent to prove what the gentleman offers it for, but tends to substantiate the other testimony to the direct opposite of what he contends.

(Further argument.)

Mr. Goldstein: I will ask it be marked for identification at this time.

(The letter referred to was marked Defendants' Exhibit E for identification.)

Mr. Goldstein: Q. Now, Mr. Wentz, I have a copy of a letter dated October 30, 1936, addressed to Mr. R. F. Urquhart by G. F. K., [107] which means George F. Keil, does it not? A. Yes.

Mr. Goldstein: And I take it you have no objection to introducing this copy and the reply of Mr.

(Testimony of Walter B. Wentz.)

Urquhart to Mr. Keil pertaining to Mr. Fereva? I don't think there will be an objection as to that.

Mr. Scott: None in the world, your Honor.

Mr. Goldstein: If your Honor pleases, I desire to offer this in evidence as one exhibit, the letter from Wentz & Erlin to Mr. Urquhart, dated October 30, 1936, and the reply, dated October 31, 1936.

The Court: Admitted.

Mr. Scott: I suggest that as they are admitted by stipulation they be read.

Mr. Goldstein: I am going to read them.

(The letters referred to were marked Defendants' Exhibit F in evidence.)

Mr. Goldstein: The letter from Wentz & Erlin reads as follows:

“October 30th, 1936.

“Mr. R. F. Urquhart,

“Bank of America Building,

“Sacramento, California.

“Dear Sir:

“Re: Policy AG-23442—L. K. Fereva d/b/a

“R. & S. Garage—11/24/36

“The above captioned policy was written last year for the account of L. K. Fereva, and will expire on November 24th.

“As Mr. Fereva has not been licensed for the

(Testimony of Walter B. Wentz.)

coming year, will you please advise what disposition is to be made of this risk. [108]

“Yours very truly,

“WENTZ & ERLIN,

“General Agents,

“By: -----

“Office Manager.”

And on the left-hand side, “GFK:KB.”

Q. “GFK” means George F. Keil?

A. Yes.

Mr. Goldstein: Now, here is the reply: At the top it reads, “Wents & Erlin, Insurance, General Agents.” On the left-hand side, “R. F. Urquhart, District Representative, 511 Capital National Bank Building, Sacramento, Calif.” On the right-hand side, “San Francisco, 206 Sansome Street, Exbrook 2064.”

“Sacramento, Calif., Oct. 31, 1936.

“George Keil,

“c/o Wentz & Erlin,

“206 Sansome St.,

“San Francisco, Calif.

“Re: L. K. Fereva License

“and Pol. #AG-23442.

“Dear Sir:

“Instructions for the renewal of the above policy will be forwarded to you before the expiration date. I appreciate your calling the fact to my attention however.

“Regarding Fereva not having been licensed this

(Testimony of Walter B. Wentz.)

year, your wrong on that. You wrote me about that several weeks ago and a few days after your letter was received I was in Lincoln and took up the subject with Mr. Fereva. The new license happened to have arrived in the mail the day before, but the envelope had not been opened, so I stood there while this was done. I saw the license myself and jotted down its number and sent it in [109] to you that same day. I believe Mr. Gordon was up here on that day.

“Any way Fereva has been licensed and if the State records do not show it or you cannot locate the information I have mentioned let me know and I’ll get it again.

“Very truly yours

“R. F. URQUHART.” [110]

Mr. Goldstein: I offer in evidence a letter in connection with Mr. Fereva, addressed to Mr. Urquhart by Wentz & Erlin, and his reply thereto.

Mr. Scott: The letter is dated January 6, 1937, and I object to it upon the ground it is too remote, that it is not admissible even for the purpose of proving what counsel desires. It is merely a communication addressed to Mr. Urquhart—it is brief; I will show it to your Honor (handing document to the Court). I object to it as incompetent, irrelevant and immaterial.

The Court: The Court will admit it with the understanding you connect it up.

(The lettter referred to was marked Defendants’ Exhibit G in evidence.)

(Testimony of Walter B. Wentz.)

Mr. Scott: The next letter, if your Honor pleases, is even a year later, November 5, 1936, and deals simply with a request [112] for renewal of the Fereva policy. We object to it as incompetent, irrelevant and immaterial.

The Court: Mr. Goldstein, in his remarks connected with the letter, has indicated he will connect it up.

Mr. Goldstein: Yes; absolutely. I can't do everything at one time.

The Court: It will be admitted with that understanding.

(The letter referred to was marked Defendants' Exhibit H in evidence.)

Wentz & Erlin

Insurance

General Agents

R. F. Urquhart

District Representative

511 Capital National Bank Bldg.

Sacramento, Calif.

San Francisco

206 Sansome Street

EXbrook 2064

Sacramento, Calif., Nov. 5, 1936

Wentz and Erlin,

206 Sansome St.

San Francisco, Calif.

Re; AG-23442 L. K. Fereva d/b/a/

Fereva Chevrolet Co.

Gentlemen:

The above policy is to be renewed upon expira-

(Testimony of Walter B. Wentz.)

tion, provided you still consider L. K. Fereva an agent. Otherwise please notify me of the fact and do not renew the coverage.

If you do renew increase the limits of Liability to 10/40,000.00. P. L. Leave off the "Additional Assured" blanket endorsement and add Mrs. Bessie K. Fereva as an additional assured. The policy is to be sent to me for delivery and financing of the premium.

Very truly yours

R. F. URQUHART

Received Nov 6 - 1936 Wentz & Erlin General Agents.

[Endorsed]: Filed July 30, 1943. Paul P. O'Brien, Clerk.

Mr. Goldstein: Then there is a copy of a letter addressed—they are all in order. These are from 1937, 1938, and 1939, down to this policy.

Mr. Scott: If your Honor pleases, to save time, may I register to each and every of those letters, each independent to the other, the objection that they, and all of them, are incompetent, irrelevant and immaterial; that they in no degree or manner whatever tend to prove any issue of agency in the case, other than supporting the facts as they now appear, namely, that Urquhart was a solicitor and was engaged in securing the policy of Fereva, and in seeing that Fereva's policy was renewed from

(Testimony of Walter B. Wentz.)

time to time, so I can't see that any one of them is either relevant, material, or competent.

Mr. Goldstein: If the Court pleases, I take issue with that statement, and it is a matter for the jury to determine what effect and valuation should be given to this policy and the facts stated within it, and the correspondence between Wentz & Erlin and its district representative. I say it is competent, and in order to save time I will offer these all as one exhibit.

The Court: The objection is overruled with the understanding that you will connect them up. [113]

(The correspondence and duplicate insurance policy referred to were marked Defendants' Exhibit I in evidence.)

Mr. Goldstein: I will read Defendants' Exhibit G, which is on the letterhead of General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland; Wentz & Erlin, General Agents, Insurance Center Building, 206 Sansome Street, San Francisco, Cal.:

“January 6th, 1937

“Mr. R. F. Urquhart,
“Bank of America Building,
“Sacramento, California.

“Dear Sir:

Re: Policy AG-990976—

“L. K. Fereva

“We are enclosing herewith Garage Form No. A-1635, which please have completed and signed by

(Testimony of Walter B. Wentz.)

the above captioned Assured, returning same to this office at your early convenience.

“Yours very truly,

“WENTZ & ERLIN,

General Agents,

“By: W B WENTZ”

Q. That is your signature, is it not, Mr. Wentz?

A. Yes, sir.

Q. Then this was returned to you by Mr. Urquhart with a notation in red typewriting:

“Sorry these were overlooked, Grownays will be received in few days.”

Signed, “R. F. URQUHART.”

You recall this communication? It is marked, “Received January 11, 1937, Wentz & Erlin, General Agents.”

Letter dated November 5, 1936. At the top “Wentz & Erlin, [114] Insurance, General Agents.” On the left-hand side, “R. F. Urquhart, District Representative, 511 Capital National Bank Building, Sacramento, Calif.” On the right-hand side, “San Francisco, 206 Sansome Street, Exbrook 2064.”

“Sacramento, Calif.. Nov. 5, 1936

“Wentz and Erlin,

“206 Sansome St.,

“San Francisco, Calif.

“Re; AG-23442 L. F. Fereva d/b/a

“Fereva Chevrolet Co.

“Gentlemen:

“The above policy is to be renewed upon expira-

(Testimony of Walter B. Wentz.)

tion, provided you still consider L. K. Fereva an agent. Otherwise please notify me of the fact and do not renew the coverage.

“If you do renew increase the limits of Liability to 10/40,000.00 P.L. Leave off the ‘Additional Assured’ blanket endorsement and add Mrs. Bessie K. Fereva as an additional assured. The policy is to be sent to me for delivery and financing of the premium.

“Very truly yours,

“R. F. URQUHART”

May I have Exhibit I?

I am now reading, members of the jury Exhibit I——

Mr. Scott: May I make a suggestion, your Honor? Exhibit I, I understand, is admitted subject to being connected up—in what manner I don’t know. Should it be read now?

Mr. Goldstein: I understood, your Honor, I was to connect it up later on, but I am offering this evidence and correspondence to show the orders that were given Mr. Urquhart by Wentz & Erlin, [115] and what they told him.

Mr. Scott: Everybody stipulates that what Mr. Urquhart was there for was for the purpose of getting agents and getting business.

Mr. Goldstein: If the Court pleases, I didn’t take that stipulation. I am going to prove that they held him out as their agent and gave him the power to waive the clause in Condition 12 and

(Testimony of Walter B. Wentz.)

Condition 7, or any other condition supplemental to the policy. Your Honor has in mind what I have reference to, that an agent—even an ostensible agent—has a right to waive a condition precedent to liability and recovery. That has been held in the Holmes-Anderson case down to the present time, and has been reiterated many, many times, and I will refer your Honor to a case that is the law of this State: that is the Bank of Seattle against Minnesota Fire Insurance Company, decided by——

The Court: Proceed.

Mr. Goldstein: Beg your pardon?

The Court: Proceed.

Mr. Goldstein: (reading):

October 26th, 1937

“Mr. L. K. Fereva,

“Lincoln,

“California.

“Re: Policy AG-220976—L. K. Fereva doing
business as R. & S. Garage—11/24/37

“Dear Sir:

“Captioned above is November expiration for your Account. Will you kindly advise if we may renew the same.

“Thanking you, we remain [116]

“Yours very truly.

“WENTZ & ERLIN,

General Agents,

“By:” ——

line for “Office Manager”, and the initials “GFK”
—that is George F. Keil, is it not?

(Testimony of Walter B. Wentz.)

The Witness: Yes.

Mr. Goldstein: And on the bottom, "C, C, to R. F. Urquhart."

Now here we have a letter from Mr. R. F. Urquhart, dated December 16, 1937. In this letter I call the jury's attention to the fact there is on the letter, "Wentz & Erlin, Insurance, General Agents. Los Angeles, 416 W. Eighth Street," and "San Francisco, 206 Sansome Street," and "R. F. Urquhart, Sacramento District Office, Ochsner Building, 719 K Street, Sacramento, Calif." addressed to:

"Wentz and Erlin

"206 Sansome St.

"San Francisco, Calif.

"Att. George Keil

"Re: AG-990976 L. K. Fereva.

"Gentlemen:

"The assured overlooked sending in instructions to renew this policy, so will you please have the new policy go forward as quickly as possible. I would like to see the policy dated back to Nov. 24, so there would be no gap in the coverage. This you are safe in doing as there have been no losses.

"Very truly yours

"R. F. URQUHART"

An inter-communication document from Mr. Urquhart to George F. Keil, dated December 18, 1937. It is on the stationery of [117] Kansas City Fire & Marine Insurance Co., "Inter-Office Cor-

(Testimony of Walter B. Wentz.)

respondence. From R. F. Urquhart. To George Keil. Date 12/18/37.

“Subject: AG-991200 L. K. Fereva

“I have just received the above which is a renewal and I note is written at the same premium as last year, however the audit on last years policy showed that the total payroll was under \$5000.00 and as there is no chance of its being increased this year, I am wondering if it is not in order to charge the minimum premium this year. Mr. Hubbard has the audit report for last year.”

This was received in the office of Wentz & Erlin, December 20, 1937.

I now read a letter dated December 23, 1937, written to:

“Mr. R. F. Urquhart,
“Ochsner Building,
“Sacramento, California.

“Dear Sir: Re: Policy AG-991200
 “L. K. Fereva

“If you will refer to your Manual you will see that the Minimum Premium for a Garage Liability policy in Lincoln is \$88.00 for \$5/10,000 Limits and if you will add 19% to this amount to equal \$10/40,000 Limits you will find that the Liability Premium will figure \$104.72. The Property Damage Minimum in Territory 8 for a Garage Liability Policy is \$25.00. This is exactly what we have charged on the above captioned policy plus the

(Testimony of Walter B. Wentz.)

additional charge for the inclusion of Bessie K. Fereva. Furthermore, the premium is very clearly marked on the policy 'Minimum Premium'.

"Also, if you will refer to last year's policy you [118] will notice that the premium charges were exactly the same, 'Minimum Premium'.

"Yours very truly,

"WENTZ & ERLIN,

General Agents,

"By:

"Office Manager

"GFK"——

again, Mr. George F. Keil.

And an inter-communication document from Mr. Urquhart, dated December 31, 1937. This is Policy A. G. 991200, L. K. Fereva:

"Please issue endorsement correcting the name of the above assured to read L. K. Fereva D.B.A. Fereva Chevrolet Co. instead of as written, please rush through."

Then, "Received January 3, 1938, Wentz & Erlin, General Agents."

A letter dated December 19, 1938, addressed to:

"Mr. L. K. Fereva,

"Lincoln,

"California"——

by Wentz & Erlin——

"Re: Policy AG-991200

"R. & S. Garage

(Testimony of Walter B. Wentz.)

“On November 25th we wrote you a follow-up of original expiration notice advising that your Garage policy would expire on December 16th.

“As we have received no order to renew presume the same is not desired and it has been marked ‘Expired’ and filed accordingly.

“Yours very truly,

“WENTZ & ERLIN,

General Agents, [119]

“By:” —

GFK, Office Manager, “Copy to R. F. Urquhart.”

The Court: Mr. Goldstein, may I suggest that you have a little pity on the reporter and read it a little more slowly?

Mr. Goldstein: I was just trying to save time. I shall. I am sorry Mr. Wight. I will go more slowly.

On November 25, 1938, I have a letter addressed to Mr. Fereva by Wentz & Erlin:

“Mr. L. K. Fereva,

“Lincoln,

“California.

“Re:

“Policy AG-991200—L. K. Fereva doing

“business as R. & S. Garage—“12/16/38

“Dear Sir:

“Captioned above is December expiration for

(Testimony of Walter B. Wentz.)

your Account. Will you kindly advise if we may renew the same.

“Thanking you, we remain

“Yours very truly,

“WENTZ & ERLIN,

General Agents,

“By:” —

George F. Keil, Office Manager, Carbon copy to R. F. Urquhart.

Under date of December 21, 1938, an inter-communication document written by Mr. R. F. Urquhart on the stationery of Potomac Insurance Company, dated “12/21/38”:

“From R. F. Urquhart

“To R. Garsen

“Subject: A. G. 991200—L. K. Fereva DBA Fereva Chevrolet [120] Co.

“Please have the above renewed as of this date, its my boot that renewal wasn’t order”

Did I read that correctly, Mr. Scott?

“Please have the above renewed as of this date, its my boot that renewal wasn’t order”

Mr. Scott: Yes. He was in a hurry.

Mr. Goldstein: “Received, December 23, 1938, Wentz & Erlin, General Agents.”

Q. I show you, Mr. Wentz, a policy dated December 16, 1938, AG 991200, and ask you if that is the policy referred to in this inter-communication by Mr. Urquhart?

A. I don’t see the inter-communication.

(Testimony of Walter B. Wentz.)

Q. Well, here it is, right here (exhibiting document to witness).

A. It seems to be the number, but it seems to be R. & S. Garage. I don't know what that is.

Q. Well, inside you will find it reads: "L. K. Fereva, doing business"—the policy itself is made out to L. K. Fereva, doing business as R. & S. Garage; the number of this policy is AG 991200.

A. Yes, sir.

Q. And this communication I have just read is with reference to the same policy?

A. That is the same number.

Mr. Goldstein: Now I desire to offer in evidence the indemnity policy of insurance which was issued by the plaintiff corporation to L. K. Fereva under date of December 16, 1938, and which is referred to in this letter of December 21, 1938.

Mr. Scott: To which we make the same objection that we made heretofore, namely, that no proper foundation has been laid to show any authority on the part of Mr. Urquhart to attach the endorsement, which is obviously what counsel wishes to get in, and [121] which is on the face of the policy. No foundation thus far has been laid for that, and as to the policy itself, that is another matter, but as to the endorsement, there is no evidence whatever that would justify the introduction of that endorsement in evidence at the present time. Counsel started in in my case on cross examination to have this same policy admitted. He was going to lay a foundation by calling Mr. Wentz. He has

(Testimony of Walter B. Wentz.)

called Mr. Wentz both in my case and his, and so far there has been no authorization of authority shown in Mr. Urquhart to place any endorsement thereon.

Mr. Goldstein: I am not offering it for that purpose.

Mr. Scott: I have no objection to it, provided that be excluded.

Mr. Goldstein: Well, what exclusion? There isn't any endorsement on it.

Mr. Scott: I mean that label.

Mr. Goldstein: Oh, this label? I will connect that up. I will withdraw the offer and we will put this to sleep for a minute.

A letter dated December 1, 1939, from Wentz & Erlin to Mr. L. K. Fereva, Lincoln, California:

“Re: AG991262—L. K. Fereva D.B.A.

“Fereva Chevrolet Co. 12/16/39

“Dear Sir:

“Captioned above is December expiration for your Account. Will you kindly advise if we may renew the same.

“Thanking you, we remain

“Yours very truly,

“WENTZ & ERLIN,

General Agents,

“By:” — [122]

GFK, Office Manager.

Here is a letter dated December 5, 1939, an inter-communication dated December 5, 1939, by

(Testimony of Walter B. Wentz.)

Mr. R. F. Urquhart, at Sacramento, to the home office, George Keil, dated December 5, 1939:

“In Re A.G. 991262—L. K. Fereva.

“In answer to yours of the 4th do not show Bessie K. Fereva as an additional assured on this years renewal. “I’m sorry I overlooked this point and thanks for bringing it up.”

This is marked “Received, December 6, 1939, Wentz & Erlin, General Agents.”

And another inter-communication, dated December 2, 1939, in connection with this—I will just read it—pardon me:

“Received, December 4, 1939, Wentz & Erlin, General Agents.

“From R. F. Urquhart at Sacramento

“To Home Office, George Keil. Date 12/2/39

“In Re the attached notice of expiration for Fereva. Please renew this with the following changes:

“Estimated Total Payroll \$5,000.00

“(audits show 2600.00)

“Limits of Liability—P.L. 7500/30000—P.D. 5000

“Limited Form D.O.C.—Bessie K. Fereve

“ ” ” ” —L. K. Fereva.

“Have policy, etc., mailed to me for delivery as I believe premium will be financed.”

. Mr. Wentz, I am not an insurance man. I direct attention to those letters, “D.O.C.” I know what it means, but will you tell the jury what is meant by “D.O.C.”? A. D.O.C.?

(Testimony of Walter B. Wentz.)

Q. Yes; "D.O.C."

A. I don't know. Where do they occur?

Q. Here (exhibiting document to witness).

A. That would [123] mean "Drive Other Cars."

Q. That is right. In other words, it authorized an endorsement to be put on there that Mrs. Fereva could drive the car and the liability would remain?

A. No; that she could drive cars that did not belong to her, or in her family.

Q. And the same for Mr. Fereva?

A. The same for Mr. Fereva.

Q. And when he said in here, "Limits of Liability," as he said in his statement, "P.L. 7500," and the other 30,000—here is the policy that he told you to execute, and it was executed, and the one in question, isn't it? On December 6, 1939, that policy was executed in accordance with this inter-communication from Mr. Urquhart to your office, isn't that right? I am just showing you a copy. The original, I think, is in the Judge's chambers.

Mr. Scott: Pardon me, are you using the office daily?

Mr. Goldstein: No; the copy appended to the complaint.

The Witness: This is a copy made out on a sample policy.

Mr. Scott: This is attached to our complaint?

Mr. Goldstein: That is attached to your complaint.

(Testimony of Walter B. Wentz.)

Q. Now, my question, Mr. Wentz, is this: I read to you an inter-communication dated December 2, 1939, in which Mr. Urquhart made these statements, that that policy was to be Limits of Liability, Public Liability 7500 for one person, 30000 for one accident; Property Damage is \$5,000. Limited Form of D.O.C.—that is, driving other cars—for Bessie Fereva, and limited form, D.O.C., for L. K. Fereva—isn't that the result of this order from Mr. Urquhart?

Mr. Scott: Just a moment——

A. It would seem to be.

Mr. Goldstein: Well, he answered the question.

Mr. Scott: My objection simply is that the——

[124]

Mr. Goldstein: I will withdraw the question.

Mr. Scott: My objections are not captious, Mr. Goldstein.

Mr. Goldstein: I beg your pardon. I withdraw the question and put it this way:

Q. Wasn't that policy issued by your company on this inter-communication and sent to Mr. Urquhart for delivery to Mr. Fereva?

A. Well, he had personally nothing to do with it, but I would judge from the correspondence that that is exactly what happened, yes.

Q. So that Plaintiff's Exhibit No. 1, the policy in question, reads exactly as this communication to your office, which I read to the jury, and limits the liability for one person to 7500——

(Testimony of Walter B. Wentz.)

Mr. Scott: I submit the two documents speak for themselves.

The Court: Yes.

Mr. Goldstein: Very well. Withdraw that. May I finish with this letter here?

Q. Now, I have a letter dated December 4, 1939, sent by your office to Mr. Urquhart:

“December 4th, 1939

“Mr. R. F. Urquhart,
“Ochsner Building,
“Sacramento, California.

“Dear Sir:

“Re: L. K. Fereva d, b. a. Fereva Chevrolet
Co.—AG-991262

“We have your order for renewal of the above captioned policy on an estimated payroll basis of \$5,000, and amending the limits of Liability to 7500/30,000 instead of \$10,000/40,000 as previously written. This will be satisfactory.

“You ask for Limited Form Drive Other Car coverage [125] for Bessie K. Fereva and L. K. Fereva, which is O. K.

“Last year the policy contained an endorsement naming Bessie K. Fereva as an additional insured as to any and all automobiles owned by or in charge of L. K. Fereva. Do you wish this coverage on the policy this year?

“You realize of course that the Drive Other Car

(Testimony of Walter B. Wentz.)

coverage does not include any cars owned by or in charge of L. K. Fereva.

“Yours very truly,

“WENTZ & ERLIN,

General Agents,

“By:” —

George F. Keil, Office Manager.

In this letter I read, the inter-communication dated December 5, from Mr. Urquhart to your office, was in answer, was it not, to the letter from your office by Mr. Keil dated December 4, to Mr. Urquhart?

A. I can't answer that. I don't know. It speaks for itself.

Mr. Goldstein: Well, in order to have this clear—it will take just a moment—I will have to read this letter out of turn. It is a communication on the letterhead of Potomac Insurance Company, marked “Received December 6, 1939, Wentz & Erlin, General Agents,”

“From R. F. Urquhart At Sacramento

“To Home Office George Keil Date 12/5/39

“In Re A. G. 991262—L. K. Fereva.

“In answer to yours of the 4th, do not show Bessie K. Fereva as an additional assured on this years renewal. I'm sorry I overlooked this point and thanks for bringing it up.” [126]

Q. That was the answer, was it not, to your letter of December 4th?

(Testimony of Walter B. Wentz.)

A. It would appear so from the correspondence.

Q. Attached to this letter in your files was a duplicate copy of the issuance of that policy in the General Accident to Mr. L. K. Fereva, as is shown here, together with the endorsements recommended by Mr. Urquhart (exhibiting document to witness)?

A. That is our copy.

Mr. Goldstein: Now, in order to complete this entire matter on this policy dated December 16, 1939, —

Q. Mr. Wentz, I show you your own records. On December 16, 1939, this policy, Plaintiff's Exhibit No. 1, AG 1556—I believe that is the correct number. Yes, 1556, as shown here, the premium charged was \$128.42. When was that premium paid, according to your records here? If I show you this account can you tell the jury, Mr. Wentz? I also give you the last sheet for 1940 (handing documents to the witness).

A. This is this policy dated December 16th?

Q. Yes, sir. A. You pointed out?

Q. Yes.

A. It would appear to have been paid on March 16th.

Q. On March 16th? A. 1940.

Q. In other words, it was paid sometime after this accident took place on February 25, 1940, wasn't it?

A. It was paid on March 16, 1940.

Q. Now, there is a notation here, "March 16, 1940, \$128.42," and then carried out, "\$128.42."

(Testimony of Walter B. Wentz.)

That would indicate that the payment was made on that date and there were policies issued by you subsequent to that time, were they not, to Mr. Fereva?

Mr. Scott: We object to that as incompetent, irrelevant and immaterial.

The Court: What is the materiality of that.

[127]

Mr. Goldstein: Your Honor, I simply want to show that he kept on acting as an agent after this accident, and the policy remained in full force and effect, and I desire to call the Court's attention to the fact that the plaintiffs have so alleged, that that policy was in effect from December 16, 1939, to December 16, 1940.

The Court: Well, that is an admission.

Mr. Goldstein: That is an admission, but I want to show that they issued policies——

Mr. Scott: The point is this: The fact that we continued to do business with a man has no relevancy whatever, and that is what I am objecting to.

Mr. Goldstein: Your Honor, the fact that the premium was paid subsequent to the accident, and a period of time over 20 days after the accident will be material.

Mr. Scott: We made no issue the premium was not paid. The only question is, when he paid it, why in the world didn't he tell us there was an accident? We wouldn't be here if he had.

Mr. Goldstein: Mr. Scott is arguing the case——

Mr. Scott: I am objecting to the pending ques-

(Testimony of Walter B. Wentz.)

tion as being incompetent, irrelevant and immaterial.

Mr. Goldstein: I will withdraw the question. Of course, it remains in the record as to when the premium was paid, I take it, your Honor.

Mr. Scott: I don't see why it should be out of the record.

Mr. Goldstein: I have no further questions from Mr. Wentz. Thank you.

The Witness: Am I excused?

Mr. Scott: No, just a moment, Mr. Wentz.

Mr. Goldstein: If your Honor please, there is just one letter [128] I overlooked—it is a copy—it is a copy of a letter I offered in evidence, and I don't want to keep it here (handing document to Mr. Scott).

Cross Examination

By Mr. Scott:

Q. Mr. Wentz, referring to the file that you produced and from which counsel has just been reading, that is a file that has been preserved, having to do with the issuance of the policy in suit and the preceding policies to Mr. Fereva, is it not?

A. Yes, sir.

Q. These letters received from Mr. Urquhart which have just been read by counsel, Exhibits G and I, are letters asking—no, sent requesting the issuance of policies, and stating the desired coverages, is that correct?

A. Stating the what?

Q. Desired coverages?

A. Yes.

(Testimony of Walter B. Wentz.)

Q. Now, the replies thereto, sent from your office, calling your attention particularly to those sent over the signature of George Keil, had to do with the acceptance, rejection, or change in the terms of the policy applied for, is that correct?

A. Yes.

Q. Mr. George Keil is also an employe of the copartnership Wentz & Erlin, is he not?

A. Yes.

Q. And has his office at the main office of Wentz & Erlin is he not? A. Yes.

Q. And has his office at the main office of Wentz & Erlin on Sansome Street in San Francisco?

A. Yes, sir.

Mr. Scott: That is all for the present, if your Honor pleases.

Mr. Goldstein: I desire to call Mr. Urquhart under Section 2055 of the Code of Civil Procedure, the same as if he was under cross examination, your Honor.

Mr. Scott: May I make this inquiry, if your Honor please? Mr. Urquhart is quite deaf, and I can foresee—well, I don't know—sort of breakers ahead, and as we are very near the time [129] of adjournment this afternoon, and have to make a decision as to when we should get together again, may I suggest that it might be advisable to dispose of that before putting Mr. Urquhart on the stand? We are going to otherwise have a witness who is not going to hear very well, and——

The Court: Ladies and gentlemen of the jury,

it has come to the attention of the Court that some of the jurors prefer, when we adjourn this afternoon, to adjourn until Friday morning. Now, will those who are in favor of that raise their hands? It looks like it is unanimous. So it will be the order of the Court that when we adjourn tonight we adjourn until Friday morning.

Ladies and gentlemen of the jury, we will now adjourn until Friday morning, and before doing so the Court asks you to remember the admonition heretofore given you with regard to discussing the case among yourselves, or with any other person or persons. You are now excused until Friday morning at ten o'clock. I wish you all a Merry Christmas.

Mr. Scott: May I ask your Honor for an order directing the witness to return?

The Court: Yes. All witnesses, either for the plaintiff or the defendants, are ordered to appear before this court on Friday morning at ten o'clock without further order from the Court. You may now retire.

(Thereupon an adjournment was taken until Friday, December 26, 1941, at 10:00 o'clock a. m.) [130]

Friday, December 26, 1941—

10:00 O'Clock A. M.

Mr. Goldstein: If the Court please, I think at the adjournment last Tuesday I called Mr. Urqu-

hart under Section 2055 to be examined the same as if he was under cross examination, as provided by the state.

Mr. Scott: May it please your Honor, may I object and point out that Mr. Urquhart is not an officer, agent, or representative of the General Accident, the plaintiff. so he cannot be called under 2055, but has to be called as an ordinary witness. The evidence shows he is an employee of Wentz Erlin.

Mr. Goldstein: I believe, your Honor, that the evidence shows thus far that he is the direct representative of the general agents of the company.

Mr. Scott: That may be, but my office boy is not a member of my firm.

Mr. Goldstein: I think, Mr. Scott, that you are not aware of the fact that that section has been amended to include a man in Mr. Urquhart's classification——

Mr. Scott: Mr. Urquhart isn't even an employee of the General.

(Argument.)

The Court: The objection is overruled. [131]

R. F. URQUHART,

called for the Defendants under Section 2055
C.C.P.; Sworn.

Direct Examination

By Mr. Goldstein:

Q. I guess I will have to come close to you, Mr. Urquhart. I have never spoken to you before. Can you hear me now?

A. Well, slightly; you better come closer.

Q. I shall come closer. You reside here in Sacramento?

A. Yes, sir.

Q. How long have you resided here, Mr. Urquhart?

A. More or less for 60 years.

Q. Do you know the City quite well?

A. Fairly well.

Q. What is your business or occupation?

A. Insurance; as representatives of Wentz & Erlin.

Q. How long have you been engaged in the insurance business?

A. In the insurance business?

Q. Yes, sir.

A. Fifteen years.

Q. How long have you been a representative of Wentz & Erlin?

A. I think I went to work with them the latter part of 1933 or 1934.

Q. Prior to that time, Mr. Urquhart, were you engaged in the insurance business here in Sacramento?

A. That is right.

Q. Now, calling your attention to one L. K.

(Testimony of R. F. Urquhart.)

Fereva, the gentleman sitting back there, how long have you known him? A. About 14 years.

Q. And have you known him during that time for insurance business? A. Yes, sir .

Q. Am I to understand, Mr. Urquhart, that you were doing business with him in the insurance line prior to the time that you went with Wentz & Erlin, is that correct? A. Yes.

Q. Have you any means at all of advising the jury just about when [132] you did become connected with Wentz & Erlin?

A. The only definite part that I can say on that is that it was either in 1933 or 1934.

Q. In 1934. I will commence with that year. You stated that you were then employed by Wentz & Erlin; and were you their representative here in Sacramento? A. As an employee, yes.

Q. In what capacity?

A. In the common sense of words, my work is described as special agent.

Q. And as the special agent for Wentz & Erlin what territory did you cover, Mr. Urquhart?

A. Practically the Sacramento Valley.

Q. For the sake of the record, what would that include? Sacramento north to the Oregon line?

A. I would describe it from the center of the Sierra Nevadas to the center of the Coast Range, north as far as Dunsmuir.

Q. How far south of Sacramento?

A. Don't go below Sacramento.

Q. Just including the City and County of Sac-

(Testimony of R. F. Urquhart.)

ramento. Now then, in 1934, when you were employed by Wentz & Erlin, did you represent them as far as all their companies were concerned?

A. Well, I presume so.

Q. Among others, did you represent the General Accident Fire and Life Assurance Corporation, Ltd.?

A. No.

Q. Did you make any agreements, or did you obtain Mr. Fereva as an agent for the company?

A. I recommended him to be appointed as an agent for the company, with Wentz & Erlin.

Q. For this particular company?

A. Yes.

Q. You made the arrangement regarding that, did you not, with Mr. Fereva?

A. As a recommendation to Wentz & Erlin's office, yes.

Q. And you had the conversation with Mr. Fereva when he put in his [133] application for an appointment, did you not?

A. As I recall, he did.

Q. As a matter of fact, Mr. Urquhart, you were the one who gave him any instructions regarding policies to be made, or any insurance to be placed in that company, isn't that true?

A. No, I can't say that I said that definitely.

Q. Well, when you recommended him for an agent's license he was appointed, was he not?

A. He was a licensed agent previous.

Q. He was a licensed agent previous, for some other company?

A. Yes.

Q. What company?

(Testimony of R. F. Urquhart.)

A. I think he was an agent for the West American, the Continental Casualty, I believe.

Q. Just a minute, Mr. Urquhart. Both of those companies wrote public liability insurance, didn't they?

A. The West American and the Continental Casualty?

Q. Yes. A. Yes, I think they did.

Q. In other words, they were automobile contracts that they wrote for property damage, collision insurance and public liability?

A. They were licensed for that, yes, sir.

Q. That is what I have reference to. Then after he gave up those companies you recommended this General Accident, is that correct?

A. Only in an attempt to get his business, I guess.

Q. All right. Well, I will just start in with July 1, 1937. You remember, of course, that he had a license for that year, from 1937 to 1938?

A. A license?

Q. Yes, a license from 1937 to 1938.

A. Couldn't have done business with him unless he did.

Q. Well, at least you made him a representative in 1934, if he received the license, as far as you know, to act as an agent for this company?

A. As far as I know. [134]

Q. And you were the one who conversed with him and talked about policies and insurance with this company?

(Testimony of R. F. Urquhart.)

A. Whenever I had the opportunity.

Q. How often, can you tell the jury, Mr. Urquhart, did you see Mr. Fereva, let us say from the year 1934 up to and including the 1st of May, 1940?

A. How often I saw him?

Q. Yes.

A. Well, I tried to make it a habit to see our agents once a month. That doesn't always happen.

Q. Could you have seen him as much as twice a month?

A. At times, yes.

Q. On those occasions when you saw him, what was the type of your conversation with him?

A. Various; a lot of intimate, a lot personal, a lot about insurance, a lot about the automobile business.

Q. On those occasions you did discuss the matter of insurance and placing the contracts with this company for automobile contracts?

A. Only by asking for more business.

Q. Do you know any other company except the General Accident Fire and Life Assurance Corporation in which you wrote any of his insurance on and after the date you went with Wentz and Erlin in 1934?

A. Previous to that?

Q. No; after that.

A. I think Mr. Fereva wrote the Garfield Agency in Auburn——

Q. As a matter of fact, is it not true that all of his automobile contracts and insurance for public liability was placed in this company, the General Accident Fire and Life Assurance Corporation?

(Testimony of R. F. Urquhart.)

A. No, sir, it was not.

Q. Was most of it placed there?

A. No, very little of it.

Q. You say very little of it. Now, did you give him any instructions as to how to write this insurance, or place the insurance? [135]

A. On the automobiles?

Q. Yes. Isn't it a fact, Mr. Urquhart, you did give him instructions as to how he was to insure automobiles, and what program he was to follow to get policies?

A. No, sir.

Q. You did not? Did you ever do that at all with Mr. Fereva?

A. No.

Q. By the way, did you participate in helping Mr. Fereva in some of these contracts of insurance?

A. On sales of new automobiles?

A. No; on writing insurance or getting policies.

A. You mean go out and help him?

Q. Yes.

A. No.

Q. This is 1934. I want to show you these two papers (exhibiting documents to witness). Look at that and see if you can recognize anything on there, or if you know what it is.

A. That is an application for his own personal garage liability.

Q. In whose handwriting is it?

A. How is that?

Q. In whose handwriting is it?

A. That is mine.

Q. That is what I want to find out. You recognize that, do you not?

(Testimony of R. F. Urquhart.)

A. That is not for the sale of automobiles.

A. Pardon me. I don't want to get you confused, Mr. Urquhart. I didn't ask you anything about the sale of automobiles; I asked you if you assisted him in obtaining insurance, or getting policies of insurance. Did you understand that?

A. I didn't get the question that way.

Q. I fully appreciate you might misunderstand me. I don't want to confuse you, Mr. Urquhart. This is in your handwriting? A. Absolutely.

Q. And there are changes on here for a certain policy—this is for the year 1934—11-12-34. The previous policy was twenty-five [136] and fifty thousand, and you changed it to ten and twenty thousand, is that right?

A. That is right. Those are my initials.

Mr. Goldstein: I want to offer in evidence now the application which the witness has identified as his own handwriting, dated Lincoln, Placer County, 11-12-34, and, your Honor, also the policy—a copy of the policy issued by Wentz & Erlin on that application prepared by the witness, and ask to have it marked Dickinson's Exhibit next in order.

Mr. Scott: Might I register the objection that this is five years prior to the policy in question; that it is incompetent, irrelevant and immaterial, and far too remote to shed any light on this transaction.

The Court: I think the objection is good, Mr. Goldstein.

(Testimony of R. F. Urquhart.)

Mr. Goldstein: If your Honor please, 1934 to 1939 would not be too remote to show the authority of the agent whom we are trying to connect with the question of notice. We can go back as far as ten years. This is very pertinent, your Honor, because it is in the handwriting of the witness, to show that he not only got this man as an agent, but he assisted him in getting his insurance, and to show how for he went.

Mr. Scott: You Honor, this is a policy on Mr. Fereva's own car, a dealer's policy issued in 1934. There is in evidence the policy issued in 1939. We have also furnished to Mr. Goldstein, and there is, as I recall it, in evidence, the correspondence between Mr. Urquhart and Wentz & Erlin covering the issuance of the policy in 1939. That is right in the record, I believe. Now then, all the rest of this, I submit, is too remote and cluttering up the record.

Mr. Goldstein: This is the only one I have where the application is prepared by Mr. Urquhart as a direct agent of Wentz & [137] Erlin.

Mr. Scott: Now, I may be in error, but we have in evidence here numerous requests—just for example this one to Urquhart in 1935, which is of younger vintage than that, and 1936—here is 1936, here is 1937, and am I right in saying this is 1939?

Mr. Goldstein: That is 1939, yes.

Mr. Scott: Here is 1939, dealing with the issuance of the very policy which covered this ac-

(Testimony of R. F. Urquhart.)

cident. Now, why go back to the year 1, or the year 1934?

Mr. Goldstein: May I point out there are certain things on here—Mr. Urquhart even went so far as to fix the premium and change the premium on the change he recommended for the next policy. I think it is important to show that he corrects the coverage from twenty-five and fifty to ten and twenty, and those are his own figures, and he fixes the premium, even. Now, I want to show his action and conduct on that part, in line with his duties as a special agent.

Mr. Scott: If you Honor pleases, this Court can take notice of the fact that the matter of fixing the premiums is simply a matter of mathematical calculation. Under the law, the rates must be filed with the Insurance Commissioner before any policy can be issued at all, and from then on, whether a man wants a ten thousand coverage, five thousand coverage, or fifty thousand coverage, it is purely a matter of mathematics. This man has no more right to fix a rate than I have.

The Court: How does it bear on the proposition of being a managing agent?

Mr. Goldstein: It bears on the proposition of his ostensible authority, your Honor, his ostensible agency.

The Court: They don't deny that. [138]

Mr. Goldstein: They do deny it.

The Court: Ostensible authority?

(Testimony of R. F. Urquhart.)

Mr. Goldstein: Absolutely. That is the position of Mr. Scott.

The Court: Is that your position, Mr. Scott?

Mr. Scott: Our position, your Honor, is that the evidence shows that this gentleman is an agent of Wentz & Erlin in this territory for the purpose of getting business, and we have shown how he got it, and how he got this particular policy from Mr. Fereva. Now, what can be more direct than that?

Mr. Goldstein: Our position is this man was more than an employee; he went out and assisted these agents, and he held himself out as a direct representative of Wentz & Erlin, and Wentz & Erlin permitted him to be held out as a direct representative of Wentz & Erlin, and when notices were sent to him of accidents, he took them, and the company acted on them. We have to prove that to prove ostensible authority. The position of Mr. Scott is he is a soliciting agent of agents, and they stopped there. Now, what I am trying to show is he went further than that; he made representations not only to his own agents, but to the company, and they acted on them. There is the thing that speaks volumes for his activities. In other words, we are going to connect this particular portion of our testimony, from 1934 to 1939——

The Court: If you do that, I will permit it. The objection is overruled.

Mr. Goldstein: Yes, sir. In other words, I have

(Testimony of R. F. Urquhart.)

no objection to Mr. Scott making the motion to strike this out of the record.

(The documents referred to were marked Defendants' Exhibit J in evidence.) [139]

Mr. Goldstein: While the Clerk is marking that I will show you another one in 1938.

Your Honor, may I be permitted to show this to the jury?

The Court: Yes.

Mr. Goldstein: I would like to pass that to the jury.

(Defendants' Exhibit J was passed to the jury.)

Mr. Scott: Are you offering this?

Mr. Goldstein: I will in just a moment.

Mr. Scott: Might I just register the same objection for the same reasons?

The Court: The same ruling.

Mr. Goldstein: May I just show this to His Honor while the jury is looking at that one (handing document to the Court)?

Q. On the bottom here is written "L. K. Fer-eva and Urquhart" (exhibiting document to the witness). A. That is right.

Q. Do you remember what that means, Mr. Urquhart?

A. Is this the one you showed me a moment ago?

Q. Yes, that is the one I showed you a moment ago. A. No, that is not my signature.

Q. No, I understand that, but——

(Testimony of R. F. Urquhart.)

A. San Francisco.

Q. That is right, but do you know what that means? A. What it means?

Q. Yes.

A. When a policy is written up there are four dailies written up with each policy; one goes with the policy, one goes to the home office, one stays in the San Francisco office, and this is written on here to identify it comes to my district, it is mailed to me.

Q. Now I call your attention to it, that refreshes your recollection that the policy is mailed to you for delivery to Mr. [140] Fereva, does it not?

A. Not as a rule. The policies don't come to me; they go direct to the agent. I get the daily copy.

Q. Just a moment. You said a moment ago that reminds you that it probably was mailed to you. A. No, I didn't say that.

Q. What did you say?

A. I said the daily.

Q. Don't you get the original copy?

A. Not to my knowledge.

Q. Let me pass this a moment. Let's take the year 1938. Take a look at this one. Look at it. Look at the name down there, "L. K. Fereva and Urquhart" (exhibiting document to the witness).

A. That is the same thing.

Q. Who is the policy sent to? A. No, sir.

Q. Not to you? A. No, sir.

(Testimony of R. F. Urquhart.)

Q. Take a look at the policy. See if that is not a duplicate of that. A. Certainly it is.

Q. Who is that policy sent to from Wentz & Erlin in San Francisco?

A. As far as my knowledge is concerned, it was sent directly, as it was always done.

Q. All right. If it was sent direct to Mr. Fereva, was it in this form (exhibiting document to witness)? A. That sticker?

Q. Yes.

A. That is put on in San Francisco when the policy is sent out.

Q. That is exactly what I want to find out.

Now, if your Honor pleases, I am going to offer in evidence a policy for public liability and property damage issued by the plaintiff corporation on December 16, 1937, for the fiscal year December 16, 1937, to December 16, 1938, and I will follow it with the next policy. Now, this is just the year previous to the one in question, and I want to offer this in evidence for the sole purpose of proving the endorsement upon the policy, which has been the bone of contention here for several days, as it is [141] identified by the witness as having been mailed directly from Wentz & Erlin in San Francisco to L. K. Fereva.

Mr. Scott: Objected to as incompetent, irrelevant and immaterial; the contract is one for the year previous. It has expired, and has nothing to do whatsoever with this action.

The Court: The objection is overruled.

(Testimony of R. F. Urquhart.)

(The insurance policy referred to was marked Defendants' Exhibit K in evidence.)

Mr. Goldstein: Q. I will show you four policies, Mr. Urquhart, one dated May 10, 1939, one dated January 30, 1940, one dated May 10, 1940, and one dated May 10, 1941, and ask you to look at those and state whether or not those are policies of this plaintiff corporation, and whether those were mailed to Mr. Fereva directly from Wentz & Erlin?

A. Well, that I couldn't tell you, about the mailing.

Q. Well, you didn't mail them to him, did you?

A. Not to my knowledge. If any policies for nearby agents would be delivered to me, the chances are I would deliver them in person.

Q. You notice, do you not, Mr. Urquhart, all four of these policies bear the same endorsement?

A. Same sticker, yes.

Q. Same sticker. R. F. Urquhart, District Representative. That was your title, wasn't it?

A. That was a copy of a sticker that I had used for quite a number of years.

Q. Wasn't that your title when these policies were sent to Mr. Fereva?

A. I haven't ever heard of having a special title.

Q. Well, the stickers were in San Francisco, as you testified a moment ago? A. That is right.

Q. They were put on by Mr. Wentz, or some-

(Testimony of R. F. Urquhart.)

one in Wentz & Erlin? Mr. Fereva didn't have these stickers, did he? A. No.

Q. You never gave him any? A. No.

[142]

Q. Or to your knowledge, no one else put them on? A. No.

Mr. Goldstein: Now, I am going to offer these in evidence—I offered them for identification previously, because I couldn't show the authority for the endorsement—now, I am going to offer them in evidence as additional evidence of the ostensible agency of this witness, now that I have identified the source of the endorsements.

Mr. Scott: The same objection.

The Court: The same ruling.

(The four policies referred to were marked Defendants' Exhibit L in evidence.)

Mr. Goldstein: I would like to have the jury see these policies I have been talking about. It will just take a moment, your Honor, to get that clear.

(Defendants' Exhibit L were passed to the jury.)

Mr. Goldstein: If your Honor pleases, I have also shown these two documents to counsel. This is a change of policy effective December 16, 1938—to run from December 16, 1938, to December 16, 1939, wherein the limits were changed from ten thousand and forty thousand to seventy-five hundred and thirty thousand, and I am going to offer

(Testimony of R. F. Urquhart.)

this in evidence, the witness having identified the handwriting of the changes as is, and having testified that this copy was sent to him, and the original sent to Mr. Fereva. This is to verify the manner and form in which the endorsements were put on the policies, and the notations on it—I will identify the notations here.

Q. You know Mr. Keil, do you not, Mr. Urquhart? A. Yes.

Q. I will show you this memorandum here with the initials "J.F.K." That is his handwriting, is it? A. Those are his initials, yes. [143]

Mr. Scott: "J.F.K.," or "G.F.K."?

Mr. Goldstein: Did I say "J.F.K."? I am sorry. It is "G.F.K."

Mr. Scott: We make the same objection.

The Court: Same ruling.

(The change of policy referred to was marked Defendants' Exhibit M in evidence.)

Mr. Goldstein: Q. At the time you sent in that change for the new policy you wrote this memorandum, did you not, Mr. Urquhart, to the company? That is correct, is it? A. Yes.

Mr. Goldstein: I offer in evidence the memorandum accompanying the notice of change for the limits of the policy marked Defendants' Exhibit K, and ask to have this marked as a special exhibit next in order, and I would like to read it.

The Court: Admitted.

(The memorandum referred to was marked Defendants' Exhibit N in evidence.)

(Testimony of R. F. Urquhart.)

Mr. Goldstein: It is an inter-communication memorandum:

“Potomac Insurance Company

“Philadelphia

“From R. F. Urquhart

“To R. Garsen

“Subject: A.G. 991200—L. K. Fereva DBA Fereva
Chevrolet Co.

“Please have the above renewed as of this date,
it's my boot that renewal wasn't order.”

Q. Now, Mr. Urquhart, is it not a fact that again the next year, in 1939, you made all arrangements in connection with the issuance of the policy dated December 6, 1939, effective as of December 16, 1939, to December 16, 1940?

Mr. Scott: Pardon me. Objected to—— [144]

The Witness: Just what do you mean?

Mr. Scott: Well, that is the objection. In other words, “made all the arrangements”——

Mr. Goldstein: Very well.

Q. I will show you this memorandum from Defendants' Exhibit I, and ask you if that is your handwriting (exhibiting document to the witness)? Just look at that and see if that is in your handwriting? A. That is my handwriting, yes.

Q. All right, now, Mr. Urquhart, the policy from December 16, 1937, to December 16, 1938, was for ten thousand limit one person, forty thousand one accident. Just look at this. An estimated payroll seven thousand, is that right?

(Testimony of R. F. Urquhart.)

A. Presumably, yes.

Q. Well, there is the policy in front of you. Look at it, Mr. Urquhart. Not presumably, but absolutely; isn't that true? That is true, isn't it?

A. It says on the face of the policy——

Q. You still won't admit it, is that what you mean? A. No; it is right on the policy.

Q. It is true, is it not—and I would like to have a definite answer, Mr. Urquhart—that the policy from 1938, December 16, to December 16, 1939, was ten thousand limit for one accident—one person? A. December when?

Q. From December 16, 1937, to December 16, 1938. A. I thought you said 1939.

Q. I beg your pardon; 1938.

A. Ten and forty thousand limits of liability, and \$7,000 estimated total payroll, yes.

Q. All right. By that communication you changed the terms? A. No, sir.

Q. What did you do?

A. Only at the request of Mr. Fereva.

Q. Mr. Fereva made the request to you?

A. Yes, sir; to get the premium down. [145]

Q. And you discussed it with him?

A. Yes, sir.

Q. Then after that you prepared this memorandum and sent it to the home office, did you not?

A. After he had agreed to change it.

Q. And you put in here:

“R. F. Urquhart At Sacramento

“To Home Office George Keil Date 12/2/39

(Testimony of R. F. Urquhart.)

"In Re The attached notice of expiration for Fereva, please renew this with the following changes.

"Estimated Total Payroll \$5000.00"—

Does that mean "audits"? A. Yes.

Q. (Reading): "(audits show 2600.00)

"Limits of Liability—P.L. 7500/30000"—
which means seventy-five hundred for one person and thirty thousand for one accident—

"P.D. 5000

"Limited Form D.O.C.—Bessie K. Fereva

" " " —L. K. Fereva."

Then you put on here:

"Have policy etc mailed to me for delivery as I believe premium will be financed."

A. On that particular policy, right.

Q. What did you mean by that, Mr. Urquhart?

A. Which?

Q. This last statement.

A. When the policy premium was financed I would take the insured to have the finance papers made out for the policy, and deliver to him with the policy.

Q. What did that consist of?

A. There were certain forms that had to be made out in triplicate, showing the down payment, monthly payment, and the interest, and this had to be signed and sent to the finance company. [146]

Q. And you took care of that?

A. As an accommodation, yes.

(Testimony of R. F. Urquhart.)

Q. So this policy came to you directly as requested? A. It did.

Q. And then——

Mr. Goldstein: Is the policy in chambers?

The Court: Did you wish it?

Mr. Goldstein: I will get it after recess. I have a copy here.

Q. Then the policy I just asked you about under this inter-communication from your office to Mr. Keil was sent to you and you delivered it to Mr. Fereva, and this is the copy changing the limits?

A. That is just a copy of the original policy.

Q. Yes, a copy.

For the purpose of the record, I showed the witness a copy taken from the complaint of the plaintiff here, which is appended as Exhibit A, which is unquestionably a duplicate, or rather, a correct copy of the original policy in question, because I don't have the original here.

Now, Mr. Urquhart, I will start in from the time when you went with Wentz & Erlin. Did Mr. Fereva report to you accidents that happened to automobiles that that company had insured for him or others?

A. I don't recall of Mr. Fereva ever having reported an accident of any description to me.

Q. Are you sure of that?

A. I am positive of that.

Q. Did Mrs. Fereva, his wife, ever report any accidents to you?

(Testimony of R. F. Urquhart.)

A. Not to my memory. I don't believe we ever paid a loss for Mr. Fereva.

Q. Do you know of any accidents at all that were ever reported to [147] you prior to February 5, 1940?

A. The only one I recall of Mr. Fereva reporting to me was one accident he told me about up in Auburn someplace.

Q. When was that?

A. I couldn't tell you, because I paid no attention to it.

Q. Do you know what year it was?

A. I don't.

Q. How was it reported to you?

A. Verbally.

Q. Where? A. I don't know.

Q. Anyhow, after he made the report to you, you sent someone up to investigate it?

A. I don't know whether the report came from Fereva or Henretty.

Q. You don't know that, even?

A. On that accident.

Q. Do you know Mr. Walter Henretty?

A. Yes.

Q. How long have you known him?

A. I imagine 14 or 15 years.

Q. You have him working on these losses, do you not, for this company?

A. No; report them to him.

Q. On whose instructions did you report them to Mr. Henretty?

(Testimony of R. F. Urquhart.)

A. That I report them to him?

Q. Yes. A. Yes.

Q. At whose instructions?

A. Just my own initiative, I guess.

Q. Wasn't it part of your duties?

A. Yes.

Q. In line with your duties as district representative of this company in Northern California, if an accident was reported to you you reported it to Mr. Henretty? A. Yes.

Q. You did it many times?

A. With the company's business?

Q. Yes. A. Yes.

Q. I am speaking of 1934.

A. You mean the general line of business?

Q. I am speaking of this particular company, the plaintiff [148] corporation. When an accident was reported to you you reported it to Mr. Henretty? A. Yes.

Q. And these reports were made verbally?

A. I made all of them verbally.

Q. You don't know what he did with them after you told him?

A. I don't know; I never followed it up.

Q. Don't you know whether he investigates those and goes out and gets witnesses?

A. I presume he does.

Q. You presume he does. Don't you know he does? A. No.

Q. Where is your office located in connection with Mr. Henretty's?

(Testimony of R. F. Urquhart.)

A. I was in the Ochsner Building; he was in the Bank of America.

Q. You saw him frequently since 1934?

A. Yes.

Q. You know what his general business in connection with these accidents was?

A. That is right.

Q. Isn't it a fact you sent him up to Mr. Fereva on several accidents, and that he investigated several accidents that Mr. Fereva personally had, and some of his customers had?

A. It is not a fact that I sent him up to Mr. Fereva. I reported it to him, and I presume he went up there.

Q. That is what I want to find out. Could you give this jury any idea of how many of those reports you made to Mr. Henretty?

A. With Mr. Fereva's business?

Q. Yes.

A. There have been very, very few. Now, I don't know how many there were.

Q. As many as five? A. I doubt it.

Q. Four? A. Possibly.

Q. You aren't sure of that?

A. No, I am not.

Q. Why couldn't there be more than five?

A. Because we have had so very few losses on Mr. Fereva's business.

Q. Do you know Mrs. Fereva?

A. Do I know Mrs. Fereva? [149]

Q. Yes. A. Very well.

(Testimony of R. F. Urquhart.)

Q. Did she report to you here some accident that occurred up there?

A. She may have; I don't recall.

Q. You wouldn't say she didn't?

A. No, I wouldn't say she didn't.

Q. And that was done orally, by word of mouth?

A. As far as I know, yes.

Q. Can you tell this jury any time when you ever received any written report from Mr. Ferreira?

A. Not to my memory, I don't recall.

Q. Isn't it a fact, Mr. Urquhart, that Mr. Ferreira at no time during your association with him as an agent, ever gave you a written report of an accident?

A. As far as I recall, it is.

Q. Just a few more questions, Mr. Urquhart. What has been your salary in connection with your office?

A. Why that question?

Q. Just to show the strength and the ability, and the integrity that you have, and they confide in you, Mr. Urquhart. It is necessary for my purpose.

A. It is on a \$200 a month basis, plus the operation of the automobile.

Q. In other words, in addition to your salary you get your expenses and travel expenses?

A. They don't amount to anything. I have been home every night.

Q. And you have been running the office alone? You have been the only man in that office, is that right?

A. The only man in the office.

(Testimony of R. F. Urquhart.)

Q. And in the telephone listing you have always listed yourself, have you not, as follows: "R. F. Urquhart, Wentz & Erlin, Ochsner Building"? That is correct, is it? A. Yes. [150]

Q. So if anybody picked up the phone book to talk to you, they knew they were talking to someone representing Wentz & Erlin, isn't that right?

A. That is right.

Mr. Goldstein: That is all, your Honor, for the present.

Cross Examination

By Mr. Scott:

Q. Mr. Urquhart, did Mr. Fereva at any time before he came to your office on April 26——

A. Had he, before he came to my office?

Q. On April 26—did Mr. Fereva at any time report to you the happening of an accident in the month of February——

Mr. Goldstein: Just a minute. Don't answer it. I want to make my objection.

Mr. Scott: Pardon me. Let me finish my question.

The Court: One at a time, gentlemen.

Mr. Scott: Q. ——the happening of an accident on February 25, 1940?

Mr. Goldstein: Just a minute, Mr. Urquhart. Don't answer that question.

If the Court please, I am going to object to it on the ground it is not proper cross examination. I didn't go into it. I just put this man on for an

(Testimony of R. F. Urquhart.)

entirely different purpose. It is not proper cross examination.

The Court: The objection is overruled.

Mr. Scott: Q. Have you my question in mind, Mr. Urquhart?

A. Yes, I think I have. Am I to answer it, or not?

Q. Yes; please answer it.

The Court: Let the reporter read the question.

(The question referred to was read by the reporter as follows:

“Q. Mr. Urquhart, did Mr. Fereva at any time before he came to your office on April 26, did Mr. Fereva at any [151] time report to you the happening of an accident in the month of February, the happening of an accident on February 25, 1940?”)

The Witness: You mean this accident of his own?

Mr. Scott: Q. Yes.

A. No, sir. [152]

LEON KARL FERREVA,

Recalled for the Defendants; Previously sworn.

Mr. Hogle: If your Honor pleases, in behalf of the Defendant Fereva, I would like to have it stipulated—move that all of the testimony of the defense—of all the defendants, of all the co-defend-

(Testimony of Leon Karl Fereva.)

ants, be considered as part of Mr. Fereva's defense, as one of the co-defendants also. I suppose there will be no objection to that, Mr. Scott?

Mr. Scott: No objection.

The Court: That is, the co-defendant you represent?

Mr. Hogle: Yes.

The Court: So ordered.

Direct Examination

By Mr. Goldstein:

Q. Mr. Fereva, you stated to the jury, I believe, last Monday, that you went out of business at some time at the end of 1940 or this year?

A Yes, sir.

Q. What became of your records? Did you keep your records, or what happened to them?

A. In going out of business, many records and files—most of them were destroyed. My home had no place to keep them. The majority were discarded.

Q. Now, Mr. Fereva, I will just commence with you from the time that you became an agent for the plaintiff corporation. Will you please tell the jury who got you to be an agent?

A. Mr. Urquhart.

Q. Did you know Mr. W B. Wentz?

A. No, I did not. [153]

Q. Did you ever meet his partner, Mr. Erlin?

A. No, sir, I never saw him.

Q. Did you ever meet a single person from the office of Wentz & Erlin in San Francisco other

(Testimony of Leon Karl Fereva.)

than Mr. Urquhart in connection with your insurance, Mr. Fereva?

A. As far as I remember, no.

Q Now, commencing, let us say, in 1934, who did you report any accidents to, or any losses in connection with any policies issued to you or your clients?

A. Mr. Urquhart.

Mr. Scott: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Goldstein: Q. What was the answer?

A. Mr. Urquhart only.

Q. How did you report it to him?

A. Personally; sometimes by phone

Q. Sometimes by phone and sometimes when he was in your place of business?

A. Yes.

Q. And after you reported any accident or loss to yourself or clients, what did he do?

A. Well, he turned it over to the authorities, I guess.

Q. What happened after that?

A. It was taken care of.

Q. Will you please tell the jury, between 1935 and February 25, 1940, how many accidents you had, or your clients had in Lincoln or Placer County, that you reported to Mr. Urquhart?

A. My own, personally?

Mr. Scott: May I have the understanding this is all subject to my objection, this whole line is subject to my objection that it is incompetent, irrelevant and immaterial?

(Testimony of Leon Karl Fereva.)

The Court: Yes. [154]

The Witness: My own, personally, or any of them?

Mr. Goldstein: Q. Any of them.

A. Many of them.

Q. How many, Mr. Fereva?

A. A dozen or fifteen, the persons I had insured.

Q. No; just your own, that you carried insurance on, public liability and property damage.

A. You mean my own, personally?

Q. That is right.

A. Well, there have been several of them.

Q. Can you give us the names of any of them?
I mean, any persons connected with them?

A. Yes; one of my salesmen, Mr. Smith; a prospective buyer by the name of Mr. Clark; Mrs. Christianson; at one time I had a partner by the name of Gianachi.

Q. And these instances were accidents, were they?
A. Yes.

Q. How did you report them to Mr. Urquhart?

A. Either verbally, or by telephone.

Q. After your report, were those accidents disposed of by the plaintiff company?

A. Yes, sir.

Q. Do you know Mr. Walter Henretty, sitting back there?
A. Yes, sir.

Q. Would you please tell the jury whether or not prior to the 25th day of February, 1940, he came up to your place and investigated accidents you reported to Mr. Urquhart?
A. Yes, sir.

(Testimony of Leon Karl Fereva.)

Q. How many, would you say?

A. I would say he was in the office many times—probably not on business for me, but he was in the office many times. At least three or four.

Q. At least three or four accidents?

A. Yes, sir.

Q. Were those accidents reported to Mr. Urquhart verbally, or——

A. They were either by phone or verbally.

Q. That is what I have reference to. Now, on the occasion just, [155] say, a year prior to the time you got this policy, do you remember having an accident somewhere around Auburn, which was reported to Mr. Urquhart? Do you remember the occasion?

A. I don't remember of any up at Auburn.

Q. Maybe I have the place wrong. Do you remember an accident to one of your cars, one of your salesmen?

A. Yes.

Q. When was that in connection with the time this accident happened?

A. Probably around 1937.

Q. Around 1937. Did you report that to Mr. Urquhart?

A. Yes, sir, I did.

Q. Verbally?

A. I wouldn't say whether it was verbally or by phone.

Q. Either way. At any rate, what became of that case?

A. It was settled.

Q. Who gave you your instructions in connection with how to issue policies in regard to this

(Testimony of Leon Karl Fereva.)

plaintiff corporation, the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland?

A. Mr. Urquhart.

Q. Did he give you any instructions as to how to insure people on automobile contracts when you sold an automobile?

A. Yes, he sat down at my desk and talked it over; yes.

Q. What instructions did he give you as to how to insure a man?

A. Well, there were certain forms of books to go by. The forms were all made out. He instructed me how to make out the forms and check them over as to the amount of insurance they wanted to carry.

Q. If you sold an automobile at your place in Lincoln, did you insure a man right there on the spot?

A. I did.

Q. For public liability and property damage?

A. I did.

Q. Did you do that at the instructions of Mr. Urquhart?

A. Yes, sir. [156]

Q. Did you do that for a long time?

A. Yes, sir; for many years.

Q. Now, in connection with this policy of insurance in question, No. AG1556, which was issued on December 6, 1939, to take effect on December 16, 1939, who was the one who changed the limits of liability from the ten thousand and forty thousand that you had the year previous, to seventy-five hun-

(Testimony of Leon Karl Fereva.)

dred for one person and thirty thousand for one accident? A. Mr. Urquhart.

Q. Did he finance that premium, by the way?

A. I believe it was.

Q. Did he make all arrangements with respect to the policy? A. Yes, sir.

Q. Did you follow his instructions implicitly at all times? A. Yes, sir.

Q. Now, on all these policies, whether they were issued to yourself or to others, did you receive your regular commission in all the years from 1934 up to the time you left the business, July 1, 1941?

A. Yes, sir.

Mr. Goldstein: As an exemplar of the manner in which those commissions were paid, Mr. Scott, he not having any books prior to the accident, I have two statements, one dated February 13, 1941, and one dated March 6, 1941, I desire to offer in evidence. It is only to show the manner——

Mr. Scott: I suggest that is encumbering the record. I submit all the testimony shows that the gentleman has been paid commissions throughout, and we produced the records, if your Honor pleases, and they have all been introduced in evidence.

The Court: Proceed.

Mr. Goldstein: I desire to offer these two statements as Defendants' Exhibit next in order.

The Court: Admitted. '[157]

(The statements referred to were marked Defendants' Exhibit O.)

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: Q. Now, after you had this accident on February 25, 1940, did you make any report of that to anyone immediately?

A. Why, verbally, to Mr. Urquhart, within a few days of the accident. It is difficult at times to get him on the phone, and I would wait until he came to my place of business to make it personally.

Q. Mr. Fereva, do you recollect the occasion when you had that accident with the tow car in the early morning of February 25?

A. Yes, I remember it very well.

Q. Will you please tell the jury approximately how long after that date did you see Mr. Urquhart at your place of business?

A. It was within a very short length of time; within three to seven days.

Q. Where did you see him?

A. In front of my place of business.

Q. By the way, was your wife working there at that time?

A. She kept the books for me.

Q. She kept the books for you. Was she in the premises at the time?

A. I could not say as to that.

Q. All right. Now, you met him at the front of your establishment?

A. Yes.

Q. What kind of door do you have leading into the establishment, just an ordinary office door, or double garage doors, or what?

A. Two big rolling doors that rolled up and left pretty near half the building open.

Q. Now, did you know right along, from the time

(Testimony of Leon Karl Fereva.)

you knew Mr. Urquhart that, very unfortunately, he was afflicted with his hearing—he was hard of hearing? A. Yes, sir.

Q. Did you get along with him? Did he understand you and did you understand him? [158]

Mr. Scott: I object to that as calling for a conclusion of the witness.

The Court: It is a conclusion.

Mr. Goldstein: It is purely preliminary, your Honor.

Mr. Scott: I submit the objection, your Honor.

The Court: The objection is sustained.

Mr. Goldstein: Q. Now, at the time that he came to your place of business, will you tell the jury just exactly what conversation you had with him in connection with this accident?

A. At the time Mr. Urquhart came to my place of business—my shop foreman had called me back to the shop for some minor adjustments on the tow car which was damaged in the accident, and while I was standing there conversing with my shop foreman Mr. Urquhart came to the front of the building and I left the shop foreman to go out and converse with him.

The Court: Speak a little louder.

Mr. Goldstein: Q. Speak a little louder, Mr. Fereva, and go ahead and tell what the conversation was.

A. Why, when I went out to meet Mr. Urquhart, why, we passed the time of day; then I said, “Bob, I want to report a little crackup I had down the high-

(Testimony of Leon Karl Fereva.)

way the other morning with my tow car." I said, "I was called out in the morning to go out to pull a car out of the ditch, and while I was towing the car out of the ditch another car ran into the car we were towing out. There were several people injured; they were scratched and bruised, but nothing serious." I think that is about the extent of our conversation.

Q. Then what happened as you were talking to him?

A. Why, as it happened, that day my service manager was off—in other words, my men alternated; each man had a day off—and I [159] worked on Sunday, and I was very busy taking my service man's place, and customers came in, and I left Mr. Urquhart standing in front of the building to wait on the customers.

Q. Now, Mr. Fereva, what you told Mr. Urquhart on that occasion, was that the same form in which you had made accident reports to him prior to that time?

A. Yes, sir.

Q. And on which he acted and sent a man up to your place?

A. Yes, sir.

Q. Do you remember an occasion—I don't want anything said to you by your wife—but do you remember an occasion some day or two after Mr. Urquhart was there, about your wife desiring to notify Mr. Urquhart?

A. Yes, I remember that.

Q. And don't tell the conversation, but did you

(Testimony of Leon Karl Fereva.)

have a conversation with her at that time as a result of which you did not call Mr. Urquhart?

A. Yes, sir.

Mr. Scott: Just a minute. I object to that as hearsay——

Mr. Goldstein: I am not asking for hearsay; I am asking for circumstances. It is preliminary only, and corroborative circumstances of whether or not the conversation took place, whether the circumstances of his wife desiring to report to the office two or three days after the accident—this was five or seven days after the accident—I am not asking for the conversation; I am asking for the circumstances.

Mr. Scott: I submit it is hearsay.

Mr. Goldstein: Very well, counsel, I will withdraw the question for a moment. I will prove it in a different way, your Honor.

Q. Now, Mr. Fereva, after you had that conversation, did you believe that Mr. Urquhart would act upon your statement to him, the same as he did in prior accidents that you reported to him in [160] the same way?

Mr. Scott: Objected to as incompetent, irrelevant and immaterial.

Mr. Goldstein: It is the gist of our case, your Honor——

The Court: The objection is overruled.

A. Yes, sir.

Mr. Goldstein: Q. Did you have any reason to believe at all that he would not act as he had in

(Testimony of Leon Karl Fereva.)

prior accidents that you reported for yourself and others whom you had insured in this plaintiff corporation?

Mr. Scott: Same objection.

The Court: The objection is overruled.

A. No, sir.

Mr. Goldstein: Q. Now, subsequent to that time, you were served with a summons and complaint, were you not? A. I was.

Q. Plaintiff's Exhibit No. 2. Now, a little after you were served with these papers, what did you do with them?

A. I took the papers to Sacramento, to Mr. Urquhart's office.

Q. And did you there have a conversation with him? A. Why, some, yes.

Q. Well, what did he say to you?

A. I turned the papers over and he said, "We will go over to Mr. Henretty's office and we will take the matter up with him."

Q. And did he then take you to Mr. Henretty's office, along with the summons and complaint that you handed him? A. Yes, sir.

Q. In order to get this clear, Mr. Fereva, did you go any place, or did Mr. Urquhart phone to San Francisco or any place before he took you to Mr. Henretty's office with the summons and complaint?

A. He phoned Mr. Henretty's office first. [161]

Q. He phoned Mr. Henretty's office; but did he phone to San Francisco or any place else before you went to Mr. Henretty's office?

(Testimony of Leon Karl Fereva.)

A. Not to my knowledge.

Q. And then you went to Mr. Henretty's office, you and Mr. Urquhart, and who gave these papers to Mr. Henretty?

A. I wouldn't say whether Mr. Urquhart did, or I.

Q. Did Mr. Henretty ever ask you if you had made any verbal report to Mr. Urquhart at that time; any oral report?

A. I think he did; I am not sure.

Q. All right. What did you say to him, if he did ask you?

Mr. Scott: Just a moment. That is a pure guess. Object to the form of the question as extremely objectionable.

Mr. Goldstein: Let me withdraw the question for the moment.

Q. Mr. Fereva, did you ever file with Mr. Urquhart, or Mr. Henretty, prior to the 25th day of April, 1940, any written report about your cars, any of your cars, or any of your clients' cars?

A. There was no occasion to report to Mr. Henretty; it was all with Mr. Urquhart.

Q. Did you ever file a written report to Mr. Urquhart?

A. I don't know of any. Very few, if any.

Q. Is this the first time that you signed any what purports to be a written report—the first time you signed any report like that (exhibiting document)?

A. To my knowledge, yes.

(Testimony of Leon Karl Fereva.)

Q. And Mr. Henretty prepared that?

A. I presume he did, yes.

Q. Now, did he ask you anything as to why you did not file a written report? Do you remember any conversation regarding that?

A. Well, he asked something about if a report had been filed.

Q. Now, what did you understand he was referring to, Mr. Fereva?

Mr. Scott: Just a moment. I object to that as calling for [162] a conclusion of the witness.

The Court: Yes. The objection is sustained.

Mr. Goldstein: Q. What kind of a report was he talking about?

A. I presume he was referring to a written report.

Q. Did you tell him you had not filed a written report? A. I believe I did, yes.

Q. Did you ever tell him you had not notified Mr. Urquhart personally, or orally?

A. No, I didn't.

Q. Did he ever ask you about that at all?

A. Yes; he asked me one question on that.

Q. What did you tell him, that is what I want to find out.

A. Well, he asked me why this wasn't reported—I can't quite place it. I said, "Yes, it has been reported." He said, "Why didn't you report it again?" I said, "I didn't think it was of enough importance, because the Highway Patrol exonerated

(Testimony of Leon Karl Fereva.)

me, and Mr. Urquhart had taken no further action with it, and that was the length of my report."

Q. That was the sum and substance of your conversation with Mr. Henretty? A. Yes, sir.

Q. And when he was talking to you was he referring to this written report?

A. I presume he was.

Q. Now, Mr. Fereva, did you report the occurrence of the accident to the Highway Patrol in Lincoln?

A. Within 30 minutes after the accident.

Mr. Scott: Object to that as immaterial.

The Court: What is the materiality of that?

Mr. Goldstein: Perhaps not. I will withdraw it. There is another matter that in my opening statement I touched upon; however, I am going to abandon it. It isn't evidence, what an attorney says in an opening statement, so I will withdraw the [163] question.

Q. At any rate, after you signed this written report, did Mr. Henretty come up to your place and investigate the accident?

A. Yes, sir; he was there many times.

Q. Did you give him every assistance he desired? Did you go with him to interview witnesses and cooperate with him in every way in that connection?

Mr. Scott: Just a moment. Objected to as calling for a conclusion of the witness.

The Court: The objection is sustained. Let him state what he did.

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: Q. Just what did you do with Mr. Henretty when he came up there to investigate the accident?

Mr. Scott: Same objection; and incompetent, irrelevant and immaterial. There is no question but we went in and investigated the accident. It is admitted in the pleadings, and there is no dispute about it.

Mr. Goldstein: If your Honor pleases, there is somewhat more to it than that. Your Honor will recall that in the testimony of Mr. Henretty——

The Court: All right; if it is desired to contradict Mr. Henretty——

Mr. Goldstein: Very definitely so.

Mr. Scott: All right; withdraw the objection.

Mr. Goldstein: Q. Will you state what you did with Mr. Henretty?

A. Mr. Henretty took all the statements and briefs of my shop foreman, and several people who passed by and seen the accident, there were several he interviewed and took statements, and most of it was in my office, typed and signed in my office. [164]

Q. Did you assist Mr. Henretty in obtaining the witnesses you named to him?

A. In every way possible.

Mr. Scott: We object to that as incompetent, irrelevant and immaterial. I have no objection if it is contradicting a statement of Mr. Henretty, but the mere showing that Mr. Henretty accompanied the defendant and Mr. Desmond—that is not material; it is all admitted in the pleadings, not at

(Testimony of Leon Karl Fereva.)

issue. The question is whether before the reservation of rights notice had been served, the proper notice had been given. That is the issue in the case.

Mr. Goldstein: Your Honor will recall Mr. Henretty volunteered certain evidence here that he could not get certain witnesses because it was too late. I want to show now that every witness that was available was there and testified, and there was no witness missing, so as to combat the inference Mr. Henretty tried to raise through his volunteered statement that there might be some prejudice to the rights of the company.

(Further argument.)

The Court: The objection is overruled. Proceed.

Mr. Goldstein: Will you read the question, Mr. Reporter?

(The last question and answer were read by the reporter.)

Mr. Goldstein: Q. Did you and Mr. Henretty interview and have in court in the defense of this action all the witnesses that you knew anything about in connection with this accident?

A. We did.

Q. What did Officer La Porte—did he know anything about that accident?

Mr. Scott: Just a moment. Objected to as incompetent, irrelevant and immaterial.

The Court: The objection is sustained. [165]

Mr. Goldstein: Q. Were you present at any

(Testimony of Leon Karl Fereva.)

conversation between Mr. Henretty and Officer La Porte?

Mr. Scott: The same objection.

Mr. Goldstein: I am asking if he was present, your Honor. I don't know whether he was or not.

The Court: You may answer.

A. I was not.

Mr. Goldstein: Q. Did Mr. Henretty make any complaint to you at any time, of any kind, because of your delay in giving him this written report, that he could not get Officer La Porte to testify in his behalf? A. No, sir.

Q. Did he ever make any statement to you in connection with Officer La Porte? A. No, sir.

Q. Did he ever make any statement to you in connection with any witnesses whom he claimed should have been there and could not be there?

A. No, sir.

Q. You were present at that trial of that case right throughout? A. Yes, sir.

Q. And you were defended by Mr. Gerald M. Desmond of Sacramento? A. Yes, sir.

Mr. Goldstein: You may take the witness.

Cross Examination

By Mr. Scott:

Q. Mr. Fereva, do I understand you correctly in stating as follows: that within a few days after the happening of the accident Mr. Urquhart drove up in his automobile in front of your place of business in Lincoln; is that correct?

A. That is correct.

(Testimony of Leon Karl Fereva.)

Q. And he sat there in his car——

A. No, no, he was out of his car.

Q. He got out of his car, did he?

A. Yes. [166]

J. And then you said to him——

Mr. Goldstein: Page 9, Mr. Scott, if I may assist you.

Mr. Scott: Q. You said to him, “Bob, I had a little crackup down the highway with the tow car”?

A. Yes, sir.

Q. You said, “The other morning we had a call to tow a car out of the ditch, and while we were there towing that out a car ran into the car which was being towed”?

A. That is right.

Q. “There was quite a little crackup and they were cut and bruised, but nothing serious”?

A. Yes, sir.

Q. That is all you told him?

A. Practically all.

Q. At that moment someone called you to your place of business?

A. Yes, sir.

Q. When you came out again after seeing a customer or two, Mr. Urquhart had gone on his way?

A. Yes.

Q. That was the whole conversation?

A. That was the whole conversation.

Q. You didn't ask Mr. Urquhart to do anything about it?

A. I just reported it to him.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

(Testimony of Leon Karl Fereva.)

Mr. Scott: Q. You didn't ask Mr. Urquhart to do anything whatever about it?

A. Our conversation was interrupted at that time.

Q. You didn't tell him when the accident had happened, did you? A. You mean——?

Q. The time. A. Yes; in the morning.

Q. You just said, "The other morning"?

A. Yes.

Q. You didn't tell him to whom the accident happened? [167]

Mr. Goldstein: Speak up, Mr. Fereva.

A. The conversation wasn't completed.

Mr. Scott: Q. You didn't tell him where the accident happened?

A. Why, nothing more than "down the highway."

Q. You didn't even tell him what highway, did you?

A. I don't remember telling him between Lincoln and Roseville; but we were interrupted, that is why. We just got into our conversation and it was interrupted.

Q. You told him, "Just the other day I had a little crackup down the highway with the tow car"?

A. Yes, sir.

Q. You didn't tell him down what highway?

A. Probably not.

Q. You didn't tell him anything but just what I asked you, namely, this: "Bob, I had a little crackup down the highway with the tow car the

(Testimony of Leon Karl Fereva.)

other morning. We had a call to tow a car out of the ditch, and while we were towing them out a car ran into the car which was being towed. There was quite a little crackup, and they were cut and bruised, but nothing serious." Now, that is all you told him? A. Probably.

Q. And that statement was given by you in your deposition on May 10th of this year?

A. It was taken here in Sacramento. I couldn't say the date. I think that is correct.

Q. And it was read over to you? A. Yes.

Q. And your recollection then, and at the present moment, is that is everything you said to Mr. Urquhart? A. Yes, sir.

Q. At that time Mr. Urquhart made no reply to you?

A. No. As I said, our conversation was interrupted.

Q. And you had known for some 14 years that Mr. Urquhart was a very deaf man?

A. Yes; I had talked to him, yes.

Mr. Scott: That is all, your Honor. [168]

MRS. BESSIE K. FEREEVA,

called for the defendants; sworn.

The Clerk: Q. Please state your name to the Court and jury.

A. Mrs. Bessie K. Fereva.

Direct Examination

By Mr. Goldstein:

Q. Speak up a little louder, Mrs. Fereva, so the reporter and jury can hear you. You reside at Lincoln? A. I do.

Q. You are the wife of Mr. L. K. Fereva who preceded you on the witness stand? A. I am.

Q. How long have you been married?

A. Since 1915; January 31, 1915.

Q. Have you a family?

A. I have two daughters.

Q. How long had you been living in Lincoln up to the 25th day of February, 1940?

A. I lived in Lincoln always; I was born in Lincoln.

Q. You were born and raised right in Lincoln, Placer County? A. Yes.

Q. You were connected with your husband in his business, doing business as the Chevrolet agency in Lincoln? A. Practically all the time.

Q. What particular line of duties did you have in connection with the business?

A. I kept the books.

Q. Did you go there every day?

A. Every day, but not necessarily regular hours

(Testimony of Mrs. Bessie K. Fereva.)

—well, I shouldn't say every day, but practically every day.

Q. There were some days you weren't there?

A. Some days, yes.

Q. You know Mr. Urquhart, do you not?

A. I know Mr. Urquhart very well, yes.

Q. Do you remember the time Mr. Fereva took on the insurance agency [170] for the General Accident?

A. I don't remember the exact time. I remember when he started to do business with him.

Q. That is what I had reference to. Can you tell the jury about when it was he started to do business with this particular company, the plaintiff?

A. Well, it is difficult for me to say just when. We have done business with them for a great many years, but in the course of our business we have had business transactions with so many insurance companies, and Mr. Urquhart has been visiting our garage for years.

Q. In connection with the plaintiff corporation did he visit your garage there and did you talk to him?

A. Yes.

Q. Did you have occasion to talk to him about insurance?

A. Yes. He gave us all our instructions regarding our insurance.

Q. How you were to do it?

A. Explained it, yes.

Q. Did you have occasion to talk to him about accidents and make reports of accidents?

(Testimony of Mrs. Bessie K. Fereva.)

A. We always told him; Mr. Urquhart visited our——

Mr. Scott: Just a moment. We object as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Goldstein: Your Honor, it is the same question I asked Mr. Fereva along the same line, as to how accidents were reported to Mr. Urquhart.

The Court: The reporter will read the question.
(Question read.)

The Court: The Court will withdraw the ruling.

The Witness: Am I to answer this?

A. We made our reports to Mr. Urquhart, and he would explain to us how these reports were to be made.

Mr. Goldstein: Q. That was in connection with insurance [171] policies?

A. Well, in connection with all our insurance business; applications for policies, or reports to be made. We had no dealings directly with anyone except Mr. Urquhart.

Q. That is what I want to find out. First of all, did you have any dealings with Mr. Wentz, or Mr. Erlin, or anybody from the San Francisco office?

A. No.

Q. Now, in case of any accident arising involving some car that was insured either for your husband, Mr. Fereva, or any of your clients, how would that report be made, Mrs. Fereva?

A. We reported it to Mr. Urquhart when he

(Testimony of Mrs. Bessie K. Fereva.)

came into the office, and if he didn't come in within a reasonable time we would phone him about it.

Q. Did you ever send a written report?

A. Not to my knowledge. It wasn't necessary.

Q. Did you, yourself, do that as the agent for the company?

A. Sometimes I would phone; sometimes Mr. Fereva phoned. Usually they were reported to Mr. Urquhart in the office.

Q. Did you ever have occasion to report them, whether by phone or in the office?

A. Yes, I reported them.

Q. Do you know of your own knowledge that your husband had a number of claims for both public liability and property damage prior to the 25th day of February, 1940, while he was an agent for this company? A. Yes, he had some.

Q. Can you tell the jury how many of these claims came up within a period of five years, let us say, from 1935 to February, 1940?

A. Well, it is difficult for me to say just how many, but I would say four or five I can remember. I remember we had two involving demonstrators, that I can remember just offhand, and one involving a used car, and also our mechanic—we placed insurance for our mechanic, who had a car that was in a wreck. [172]

Q. Those you remember personally?

A. I remember those, and could place them definitely.

Q. Did you report those to Mr. Urquhart, then?

(Testimony of Mrs. Bessie K. Fereva.)

A. I couldn't say that I reported them, or Mr. Fereva reported them. [173]

MRS. BESSIE K. FEREEVA,

resumed.

Direct Examination

(Resumed)

By Mr. Goldstein:

Q. Mrs. Fereva, I believe just before the noon recess I was asking you about the manner in which you, as the bookkeeper and assistant to your husband in his business, reported any accidents or losses in connection with policies issued to your husband or to his customers. How were those reported?

A. They were reported to Mr. Urquhart either when he was in the office or phoned to him.

Q. And on these occasions do you know what happened after the report of an accident took place?

A. Well, Mr. Urquhart took care of it from the time we reported it to him. We had nothing to do with that, as far as the report is concerned.

Q. Did someone come up there to investigate the accident?

Mr. Scott: Objected to as leading and suggestive.

The Court: The objection is overruled.

A. After an accident was reported, yes, Mr. Henretty, on several occasions, came up there.

Mr. Goldstein: Q. I was just going to ask you that. You know Mr. Henretty, do you not?

(Testimony of Mrs. Bessie K. Fereva.)

A. Yes; he was in the office several times.

Q. In what connection did he come to your office or establishment in Lincoln?

A. Investigating these claims. [174]

Q. And were those the claims that were reported either by you or your husband verbally to Mr. Urquhart?

A. Yes.

Q. Did you ever make any report to Wentz & Erlin in San Francisco?

A. No.

Q. Did you ever send any written report to Mr. Urquhart, or anybody, about any accident?

A. The reports, as far as I remember, were all orally to Mr. Urquhart, either personally or by telephone.

Q. I direct your attention, Mrs. Fereva, to a time shortly after the 25th day of February, 1940. I refer now to the accident which occurred with the tow car that Sunday morning. You remember that?

A. Yes.

Q. Shortly after that, Mrs. Fereva, will you please tell the jury whether or not you did anything in connection with making any report to Mr. Urquhart by phone?

A. I didn't make a report by phone——

Q. Pardon me. What did you do, Mrs. Fereva, following that accident on February 25, 1940?

A. Well, some time——

Mr. Scott: Just a moment. Objected to as incompetent, irrelevant and immaterial,——

Mr. Goldstein: I submit the question.

(Testimony of Mrs. Bessie K. Fereva.)

Mr. Scott: ———unless there is some communication to the plaintiff company.

Mr. Goldstein: Will you read the question, Mr. Reporter?

(Question read.)

Mr. Goldstein: Q. In connection with making any phone call to Mr. Urquhart, or report to him?

The Court: You may add that.

Mr. Scott: She testified she didn't, your Honor.

Mr. Goldstein: Your Honor, that is just exactly what I want to show. [175]

The Court: Proceed.

Mr. Goldstein: Q. Will you answer the question, Mrs. Fereva?

A. I couldn't say the exact time; within a week or thereabouts I asked Mr. Fereva if I should phone——

Mr. Scott: Just a moment——

Mr. Goldstein: Just a moment. If the Court pleases, I am going to make this statement to your Honor: that this evidence is competent for two reasons: First of all, it is an admission against interest; and second, the person who made this statement was an agent of the company. Mr. Fereva, at the time of this conversation and one further conversation which I will offer in evidence, was, as shown by the record, a licensed agent of this corporation, and as far as third persons are concerned, his statements or admissions against the company, whether made to his wife or someone else, is immaterial. I en-

(Testimony of Mrs. Bessie K. Fereva.)

deavored this morning to bring this out when I tried to show by Mr. Fereva as to whether or not Mrs. Fereva reported the accident, and Mr. Scott objected and your Honor sustained the objection, and rightly so, because he can't testify to it, he being an agent of the company, but I want to prove it by others as bearing on whether or not he did give notice, and what he said about it.

Mr. Scott: May I respectfully suggest, if your Honor pleases, Mr. Fereva unquestionably is, or was, a soliciting agent of the plaintiff. However, that simply doubles the obligation that Mr. Fereva owed to the company. As an agent—dealing simply with that phase of the case—there was due from him to the company the very highest good faith and loyalty, and the imparting of information immediately. As an assured, under his contract there was also the duty of giving the company a notice. Now, it cannot be said that something that he said to his wife, or that he might [176] have said to some third party, or some stranger, not in the course of doing any business for the company, would be an admission against the plaintiff, and would be chargeable to the plaintiff, and would be anything else than pure hearsay. That is the reason I object to it.

(Argument.)

The Court: The objection is overruled.

Mr. Goldstein: Q. Can you remember the question, Mrs. Fereva? A. I think I do.

Q. Will you please answer it?

(Testimony of Mrs. Bessie K. Fereva.)

A. When I asked him if I should phone to Mr. Urquhart, or we should phone to Mr. Urquhart and report the accident, I will use his own words: He said, "Bob was in the other day"—"Bob" meaning Mr. Urquhart—"and I reported it to him when he was here."

Mr. Scott: I move the answer be stricken out on the grounds it is incompetent, irrelevant and immaterial; and also assign the asking of the question as misconduct on the part of counsel.

The Court: Overruled.

Mr. Goldstein: Q. Mrs. Fereva, is that the reason you didn't phone in this specific accident that occurred on February 25, 1940, to Mr. Urquhart?

Mr. Scott: I make the same objection.

A. Absolutely.

The Court: Overruled.

Mr. Goldstein: Q. What was the answer?

A. Absolutely.

Mr. Goldstein: You may take the witness.

Cross Examination

By Mr. Scott:

Q. Mrs. Fereva, in response to questions that have been asked you, you stated that in years past it was your [177] husband's habit to communicate with Mr. Urquhart if something happened?

A. Yes.

Q. By the way, some years before he became connected with the General Accident, Mr. Fereva was in the insurance business and associated with Mr. Urquhart?

A. Yes, sir.

(Testimony of Mrs. Bessie K. Fereva.)

Q. At that time Mr. Urquhart was the agent of other companies; correct? A. Yes.

Q. Now then, following that practice, you remember, do you not, that practically immediately upon communication of this information to Mr. Urquhart, Mr. Henretty would be there attending to the matter? A. I can't say immediately.

Q. Well, within a day, or two days?

A. He would come eventually to——

Q. Now, eventually. Isn't it a matter of fact that Mr. Henretty would be there on the job right away, within a day or two?

A. I can't say within a day or two. I couldn't say exactly how soon he would come there. He came at different times. I can't say exactly how soon after the report.

Q. Well, in the matters you were interested in, it is true, is it not, that Mr. Henretty would be there, say, within three, four, or five days at the very outside?

A. Well, I can't answer that definitely yes, Mr. Scott.

Q. Isn't that very close to it?

A. He would come and take care of them, but I couldn't say exactly how soon.

Q. He came very promptly; isn't that true?

A. Well, I can't say yes to that, because I couldn't say just exactly how soon he did come.

Q. Put it in your own words. How soon was it?

A. Well, after we reported them he would come

(Testimony of Mrs. Bessie K. Fereva.)

in the course of, I suppose—it is difficult for me to say just how soon—— [178]

Q. Mrs. Fereva, I don't propose to try to pin you down, but you did have, you say, three or four instances that you remember, in which you were interested, at the least, which matters were reported to Mr. Urquhart and were attended to by Mr. Henretty. A. Yes.

Q. Now, that was the setup, wasn't it? In other words, from your observation Mr. Urquhart wasn't the man who investigated and adjusted the claim, but Mr. Henretty?

A. It was reported to Mr. Urquhart and someone else—Mr. Henretty, as I remember, each time.

Q. And that procedure was followed in every case in which you and your husband were interested?

A. I think—as I remember, I think Mr. Henretty investigated them.

Q. Or it might have been Mr. Bell, or Mr. Gordon, or someone else, but at any rate it was attended to, was it not? A. Yes.

Q. And that was done—now, let us put it in your own words—that was done in how many days, roughly?

A. I couldn't say how many days, because after we reported it, it was out of our hands. We had done what we were supposed to do, and Mr. Henretty would come to the office and contact Mr. Fereva, and maybe go out and contact witnesses.

(Testimony of Mrs. Bessie K. Fereva.)

I wasn't there all the time. I just worked part days.

Q. And that was done, let us say, within ten days?

A. I don't like to say the number of days.

Q. Well, it was roughly seven or eight days?

A. I don't like to say the number of days.

Q. Put in in your own figures, your own recollection.

A. I can't remember back to the number of days and say how many days.

Q. Let us assume within seven days after this accident your [179] husband said to you he had told Mr. Urquhart about it; let's assume that to be a fact: You know, as a matter of fact, there was never anything heard from Urquhart, Henretty, or anybody representing the company, until 60 days after, when summons and complaint came in, and you telephoned to Mr. Urquhart? That is true, is it not?

A. I don't know; I couldn't say positive that I telephone, or Mr. Fereva telephoned.

Q. Now, you have known Mr. Urquhart for 15 or 16 years, or so? A. Very well.

Q. Been a guest at your house? A. Yes.

Q. And you would characterize him as quite an intimate friend? A. Yes.

Q. Now, isn't it true that the remainder of the whole 60 days elapsed, and the summons and complaint came into your hands without having heard

(Testimony of Mrs. Bessie K. Fereva.)

anything further of an accident in which three people were injured, isn't that true? A. Yes.

Q. You didn't have anybody come and even ask you any questions as to who were hurt? That is true, isn't it? In other words, there was a total silence there until April 26th? That is correct?

A. As far as I know.

Q. And on April 26th you took the telephone and notified Mr. Urquhart that you had a summons and complaint, and arranged to have your husband come down to San Francisco to Mr. Urquhart's office? A. Sacramento.

Q. Pardon me; I mean down to Sacramento. Isn't that true?

A. I don't remember who talked to Mr. Urquhart; whether Mr. Fereva talked to him or I talked to him.

Q. Did it ever occur to you to wonder why about two months had gone by, and three injured people, your own tow car injured, another automobile injured, and there was this continual silence? [180] Did that ever occur to you?

A. No, it didn't, Mr. Scott.

Q. It never occurred to you to speculate on it?

A. No, I didn't think it was anything to take care of; I thought the company was taking care of it.

Mr. Scott: Will you read the answer?

(Answer read.)

Mr. Scott: Q. By the way, you were living

(Testimony of Mrs. Bessie K. Fereva.)

continuously at home with your husband, were you not? A. Yes, sir.

Q. And in his place of business every day?

A. Practically every day. As I say, I didn't go to the office regularly.

Q. Now then, this intimate friend of yours, Mr. Urquhart, came through Lincoln, as counsel said, about twice a month? A. Yes.

Q. So in two months he made four visits?

A. Possibly, yes.

Q. And you saw Mr. Urquhart during those visits? A. Yes.

Q. And yet you never thought to mention to Mr. Urquhart that here was an accident involving three injured people? You never thought of mentioning it, did you?

A. No, I don't remember of mentioning it.

Q. You never even asked Mr. Urquhart whether it had been found out whether or not Dickinson or his wife were in the hospital, or whether Kemp was in the hospital?

A. As I remember, Mr. Scott, at one time prior to that when we had an accident, it was reported, it was just taken out of our hands and settled, and we didn't know anything about the settlement for——

Q. Now, I am asking you—that wasn't a personal injury accident involving your husband's car, was it?

A. It involved one of our used cars, as I remember.

(Testimony of Mrs. Bessie K. Fereva.)

Q. But your husband wasn't driving?

A. No; it was a prospective customer who had been driving.

Q. Now then, coming back to the question again: Let's assume Mr. [181] Urquhart made four visits, and on each occasion you saw him; it is true, is it not, that, as intimate as your friendship was, you never even whispered to him about this outstanding mess or claim, is that true?

A. No, it wasn't discussed.

Q. Not discussed at all? A. No.

Q. And you would have us then believe that your husband told you, some seven days after the accident, that he had spoken to Mr. Urquhart?

A. Yes, he did.

Q. And that thereafter you just dismissed the matter from your mind? Is that what you would have us believe?

A. Well, no; we had a business. We had a great many things on our minds. Our business was primarily car sales, and a garage business.

Q. Yes; in connection with that business. Let me ask you this question—I don't know what the facts are, but is it, or is it not a fact that during these 30 days your husband brought suit against the Dickinsons?

Mr. Goldstein: I didn't get that question.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

A. There was no suit. There was a citation, a

(Testimony of Mrs. Bessie K. Fereva.)

traffic citation, or something of the kind. It wasn't a suit.

Mr. Scott: Q. Issued against the Dickinsons?

A. Well, I am not positive just as to that. It was something handled locally through the traffic officers.

Q. And isn't it true that during this time your husband discussed with you his contention that he was going to try to hold Mr. and Mrs. Dickinson responsible for the damage to his tow car?

A. I don't think so.

Q. You don't recall that being discussed, is that correct?

A. No, I don't remember that we discussed that.

[182]

Q. Now, coming down to the day when the summons and complaint were served, were they served at your husband's place of business upon him?

A. I think they came in the mail, didn't they?

Q. You mean that the summons and complaint were served in the mails upon you?

A. I am not positive about that. These papers, these legal papers that came?

Q. Yes.

A. I was under the impression they were mailed to us.

Q. The papers that were served, those that caused Mr. Fereva to come down to Mr. Urquhart's office, those papers were served personally, were they not, in his place of business in Lincoln?

A. I think they must have been served when I wasn't there, probably.

(Testimony of Mrs. Bessie K. Fereva.)

Q. Now, were you there when the appointment was made with Mr. Urquhart?

A. Over the phone?

Q. Yes.

A. Yes, I think I was there at the time the appointment was made. I am still under the impression these papers came through the mail.

Q. Now then, do you remember whether or not on that occasion you were at all surprised, alarmed, or concerned by the fact your husband was being sued for some \$10,000?

A. I thought that was being taken care of by the insurance company.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

Mr. Scott: Q. Will you answer that question?

Mr. Goldstein: She has answered it.

Will you read the answer, Mr. Reporter?

(Answer read.)

Mr. Scott: It isn't responsive.

Mr. Goldstein: I submit it is responsive. It calls for a conclusion, it calls for a statement, and I submit it is an answer.

Mr. Scott: I move the answer go out as not responsive. I [183] ask the question be read again.

The Court: I think it is an answer. It is an answer, but not responsive. It may go out.

Mr. Scott: Q. Will you kindly listen to the question and answer the question directly?

(Question read.)

(Testimony of Mrs. Bessie K. Fereva.)

The Court: You can answer that yes or no, were you alarmed or not?

A. Well, no.

Mr. Scott: I see.

Mr. Goldstein: Did you want to explain your answer?

The Witness: Could I?

Mr. Goldstein: She has a right to explain that answer.

Mr. Scott: Sure; go right ahead.

The Witness: I can only answer as I did; I thought the insurance company was taking care of it.

Mr. Scott: Q. Yes. And you knew, did you not, that Mr. Campbell, who was working there in your place of business for your husband, was also there at the scene of the accident when it happened? You knew that, didn't you? A. Yes.

Q. You knew that Mr. Campbell and your husband had taken one or more of the people to the hospital, or the doctor's?

A. I knew it in a general way. This accident happened early in the morning, before I went to the office.

Q. But you knew that from what you heard?

A. Yes.

Q. And you also knew, did you not, that during these 60 days nobody had even come to your place of business to ask your husband or Mr. Campbell what had happened?

A. No. I didn't know. I couldn't answer that,

(Testimony of Mrs. Bessie K. Fereva.)

because I wouldn't know who would talk to my husband or Mr. Campbell. I couldn't answer that.

[184]

Q. Well, let me put it this way: Did it, in that interval of 60 days, strike you as being at all odd that with the most important accident in which your husband had ever been involved, not even a word had been heard from the company?

A. No, Mr. Scott. I didn't know how long—I hadn't had experience with such things. I didn't know how long such things took.

Q. Now, just a moment. You have been married, you say, since 1915? A. Yes.

Q. And I hope happily. And during all that time your husband has been an insurance man?

A. Yes.

Q. And during that time for the plaintiff company, and for the Western, and the Continental, and the Merchants, and Potomac, and others, he had placed more or less insurance before? Correct, is it? A. Yes.

Q. And during that time you say that on at least two or three occasions where more or less minor accidents had happened involving your husband's own car, the matter had been handled with promptitude by the company, adjusted and settled and out of the way, isn't that correct?

A. Yes.

Q. This accident in which three people were injured was the most serious one your husband ever had in his life, wasn't it?

(Testimony of Mrs. Bessie K. Fereva.)

A. Well, it turned out to be.

Q. Well now, in this case do you mean to say that it never even entered your mind to wonder why, if Mr. Urquhart had been told seven days after the accident, no further word had ever come to you or your husband during all this period of time?

A. Well, the thought had been, Mr. Scott, that after it was reported to the insurance company, that they were taking care of it.

Q. I see. And it fitted into the picture. All right. [185]

A. Well, I had absolute confidence that they were taking care of it.

Q. Well, now, coming back again to the day your husband came in to Mr. Urquharts office with the summons and complaint, have you now any recollection as to whether you arranged that appointment with Mr. Urquhart?

A. I couldn't say positively whether I did the phoning, or Mr. Fereva did the phoning. I may have put in the call, and he talked; I couldn't say definitely.

Q. You have no memory on it?

A. I wouldn't say positively. I may be wrong.

Q. Just to refresh your recollection, do you remember whether you told your friend, Mr. Urquhart, that the summons and complaint had been served, and that you had been trying to get your husband to report the accident, and he said he wasn't to blame; wasn't going to report it?

(Testimony of Mrs. Bessie K. Fereva.)

Mr. Goldstein: I didn't hear the question. May I have the question read?

(Question read.)

A. I have no recollection, no, Mr. Scott.

Mr. Scott: Q. Can you tell us now, looking back at that time, whether you did or did not communicate such a message to Mr. Urquhart?

A. I didn't communicate such a message to Mr. Urquhart.

Q. You are sure of that?

A. Positive I did not.

Mr. Scott: That is all.

Mr. Goldstein: I have no further questions. Step down.

Mr. Dickinson, take the stand, please.

CHARLES GROMER DICKINSON,

called for the Defendants; Sworn. [186]

The Clerk: Q. Please state your full name to the Court and jury.

A. Charles Gromer Dickinson.

Direct Examination

Mr. Goldstein: Q. Please speak up so the ladies and gentlemen of the jury can hear you. Your full name is Charles Gromer Dickinson?

A. Yes, sir.

Q. Where do you reside at the present time?

A. In Big Bend, California.

(Testimony of Charles Gromer Dickinson.)

Q. What county is that in?

A. It is in Shasta County.

Q. Are you married? A. Yes, sir.

Q. Doris May Dickinson is your wife?

A. Yes, sir.

Q. Was she the one who was injured in this auto accident? A. Yes, sir.

Q. Where is she now, at home?

A. At home.

Q. Unable to be in court, is she?

A. Yes, she is.

Mr. Scott: I object to that——

Mr. Goldstein: I have a right to show why a party isn't in court——

Mr. Scott: The pleadings admit that this gentleman and his wife have a judgment that is——

Mr. Goldstein: That is not the purport of our testimony——

Mr. Scott: The pleadings admit the making and entry of this judgment, and it is outstanding and unpaid. Now then, what further is there to which this man can testify? I object to it as irrelevant.

(Argument.)

The Court: The objection is overruled.

Mr. Goldstein: Q. She is unable to be here because of illness, is that correct? A. Yes, sir.

Q. Mr. Dickinson, have you received any part or portion of this [187] judgment that you obtained in the Superior Court of Placer County?

A. I have not.

(Testimony of Charles Gromer Dickinson.)

Q. I want to ask you, Mr. Dickinson, whether or not you went to see Mr. L. K. Fereva, the gentleman who sits there, and the man whom you sued, at his place of business shortly after the 25th day of February, 1940? A. I did.

Q. Will you please just face the jury a minute, Mr. Dickinson? About when did you go to see Mr. Fereva at his place of business in Lincoln, Placer County?

A. I went down there sometime between five and twelve days after the accident.

Q. What did you have in Mr. Fereva's garage that caused you to go down there?

A. I had my car.

Q. Had the car been wrecked in the accident?

A. Yes, sir.

Q. When you went down to get the car, as you told the jury, in the period of between five and twelve days after the 25th day of February, 1940, did you have a conversation with Mr. Fereva?

A. Yes, sir.

Q. Did you have a conversation with him regarding this accident? A. I did.

Q. Will you please state what the conversation was?

Mr. Scott: Objected to as incompetent, irrelevant and immaterial; purely hearsay.

Mr. Goldstein: I submit the question, your Honor, bearing upon the question of notice and statements made by the Defendant Fereva.

The Court: The objection is overruled.

(Testimony of Charles Gromer Dickinson.)

Mr. Goldstein: Q. You may state to the jury what the conversation was.

A. Well, I went down to see Mr. Fereva. I told him my wife was very seriously injured, and asked him what he was going to do about it. He told me that the insurance company [188] had my car tied up there, and was taking care of it, and everything was going to be taken care of.

Mr. Scott: I ask the whole answer go out.

Mr. Goldstein: Submit the motion.

The Court: Q. Are you stating the conversation you had with Mr. Fereva? A. Yes, sir.

The Court: The objection is overruled.

Mr. Goldstein: You may take the witness.

Mr. Scott: No questions.

Mr. Goldstein: Your Honor, I desire to call back Mr. Urquhart now, just for a few questions, under 2055.

R. F. URQUHART,

Recalled for the Defendants under Sec. 2055 C.C.P.; previously sworn.

Direct Examination

Mr. Goldstein: Q. Mr. Urquhart, were you in Lincoln, Placer County, sometime around March 1, 2, or 3, of 1940, last year? A. I was what?

Q. Were you in Lincoln, Placer County, sometime around the 1st, second, or 3rd of March 1940, last year? A. In Placer County?

(Testimony of R. F. Urquhart.)

Q. Lincoln. Were you in Lincoln around the 1st, 2nd, or 3rd of March of last year?

A. I couldn't say that I was or I was not, because I really don't know.

Q. You wouldn't deny that you may have been there, would you?

A. I wouldn't deny that I was, or I was not.

Q. But if you had been in Lincoln you would have seen Mr. Fereva, would you not, on those days?

A. No; there are times when I wouldn't—

Mr. Scott: Objected to as speculative. [189]

The Court: Yes, it is. Reframe the question.

Mr. Goldstein: Q. Can you tell the jury whether or not you saw Mr. Fereva at his place of business in Lincoln sometime the first week of March, last year?

A. I couldn't definitely say, because there are times when I didn't stop there.

Q. You might have been there?

A. I might have, or I might not.

Q. Now, you told the jury that Mr. Fereva made no report to you about the accident. Are you sure about that?

A. I am positive it wasn't told me until he came to my office.

Q. Do you remember having a conversation with Mr. Fereva in your office in Sacramento on Friday, December 5, 1941?

A. Friday, December 5, 1941?

(Testimony of R. F. Urquhart.)

Q. 1941; around noon time.

A. This is the 26th. Mr. Fereva was in the office some day this month, yes.

Q. Do you remember what conversation you had with him at that time?

A. As I recall, he came in about this case. [190]

Q. I will ask you if at that time you and he were present in your office around noon time in the Ochsner Building here in Sacramento, 719 K Street?

A. That is right.

Q. And nobody else was there, is that right?

A. That is right.

Q. Just the two of you?

A. Just the two of us.

Q. I will ask you whether, at that time and place, he asked you for the records of the insurance policies which he had placed in this plaintiff corporation, the General Accident company, and you told him they were all in San Francisco; you couldn't give them to him?

A. That is right.

Q. And I will ask you if, at that time and place, he didn't ask you if you didn't remember that he reported the Dickinson accident to you a few days after it occurred, and you said, "No, I don't remember; I have no recollection of it"? That is correct, is it?

A. Yes.

Q. Didn't Mr. Fereva, at that same time and place, say to you, "You must remember, because I told you about it," and you said, "No, I don't remember it"? Do you recollect that?

A. Yes.

(Testimony of R. F. Urquhart.)

Q. And then didn't you say, "Anyway, I couldn't testify to that, because it would mean my job"? A. I don't remember saying that, no.

Q. Will you swear positively, before this jury, that you didn't make that statement?

A. Will you repeat that last statement before I swear?

Q. Did you make the last statement to Mr. Fer-eva, "Anyway, I couldn't testify to that, because it would mean my job"?

A. No, I don't remember making that statement at all.

Q. You wouldn't say you didn't make that statement? A. I certainly did not.

Q. You did not? A. I did not. [191]

Mr. Goldstein: There is just one matter—may I be permitted to go back—I overlooked asking this witness in the nature of further proof on the agency, whether he reported all other accidents to Wentz & Erlin, so may I be permitted to ask that?

Q. Mr. Urquhart, you were also, during the times I asked you about this morning, let us say from 1934 to 1940, and at the present time, the district representative of the Mercantile Insurance Company of America? A. I am.

Q. I mean Wentz & Erlin were?

A. Wentz & Erlin were.

Q. But you were the district representative here? A. No, sir; only for Wentz & Erlin.

Q. That is what I asked you, only for Wentz

(Testimony of R. F. Urquhart.)

& Erlin, that is correct. Also, the name applies to the Potomac Company?

Mr. Scott: Just a moment. I object. The witness has testified that he isn't the representative of the company, but was the representative of Wentz & Erlin.

Mr. Goldstein. That is all I am asking.

Mr. Scott: That is not the phraseology of his question.

Mr. Goldstein: I beg your pardon, Mr. Scott; perhaps I was deficient in expressing what I had in mind.

Mr. Scott: Suppose you reframe the question.

Mr. Goldstein: I will reframe the question.

Q. Were you the district representative of these companies that I am going to ask you about, for Wentz & Erlin here in Sacramento, and having charge of the Northern California territory——

A. I can't say——

Q. Were you employed by Wentz & Erlin?

A. Yes, sir.

Q. Did that include these companies: Mercantile Insurance Company of America?

A. The underwriters, yes. [192]

Q. All right. Potomac Insurance Company?

A. Right.

Q. The Scotch Underwriters of Caledonia?

A. I don't know anything about that.

Q. All right. U. S. Merchants and Shippers?

A. I believe that is right.

Q. How about the Seaboard Surety Company?

(Testimony of R. F. Urquhart.)

A. Yes.

Q. And the General Accident?

A. That is right.

Q. I will show you some policies issued to Mr. L. K. Fereva, five, in the Mercantile Insurance Company of America——

Mr. Scott: Just a moment. I object to this, if your Honor pleases, on the ground it is incompetent, irrelevant and immaterial. We have the policies, which alone concern the plaintiff; those of other corporations are simply different issues. The policies are in different forms; the contracts are not the same——

The Court: What is the purpose?

Mr. Goldstein: The purpose of this, if your Honor pleases, is to show ostensible authority and the direct connection of the agency with not only this company, but any other company in which the assured Fereva was the agent, and show that the policies were issued by Wentz & Erlin, and the same endorsements were placed on them and sent to Fereva.

Th Court: For that purpose it will be received.

Mr. Goldstein: For that purpose only.

Mr. Scott: If your Honor please, in order not to encumber the record and get away from the issue, all of these policies are policies having to do with property losses; they are not policies having to do with liability. They are all, as the evidence shows, with other companies where there is no claims department, whereas with us, we have a

(Testimony of R. F. Urquhart.)

claims department functioning entirely apart from the agencies. Now, we have the case squarely before the [193] Court relative to the General policies, but the minute we step outside of that and go into other companies and other policies we are likely to get into a mass of things that have nothing to do with the issue here.

The Court: As I understand, it has to do with the witness on the stand.

Mr. Goldstein: May I answer Mr. Scott?

Mr. Scott: I am sorry to encroach upon you. It is a fact that here there are two or three policies of the General in evidence with the label on. Now, what relevancy is there *is* there were other policies with other companies that had such a label?

Mr. Goldstein: If your Honor please, may I state this: Your Honor will recall the evidence of both Mr. and Mrs. Fereva that some of these losses reported to Mr. Urquhart included property damage. Now, the policies in evidence are public liability policies, and collision insurance. Now, these policies, your Honor, pertain to the losses they testified to regarding property damage of others. Now then, to show the causative connection between the witness and Wentz & Erlin, and show that he had authority to waive a condition precedent to liability, such as the waiving of notice, I am offering as exemplars policies accomplished by the same agency and the same attorneys-in-fact, but in a different company, and I am not

(Testimony of R. F. Urquhart.)

claiming this company has anything to do with the plaintiff corporation——

The Court: The objection is overruled.

Mr. Goldstein: I will offer these five policies, one dated December 30, 1938, two dated March 15, 1939, one dated August 1, 1939, and one dated August 1, 1940, all in the Mercantile Insurance Company, bearing the same endorsement, "In case of loss, removal, or any change, notify R. F. Urquhart, District [194] Representative, 719 K Street, Sacramento, California, Phone Capitol 7190."

(The five insurance policies referred to were marked Defendant's Exhibit P in evidence.)

[195]

LEON KARL FEREVA,

recalled by the Defendants; previously sworn.

Direct Examination

By Mr. Goldstein:

Q. On Friday, December 6, 1941—rather, I think the 5th, it was—. Was it the 5th? I may be wrong——

Mr. Scott: Well, whatever it was——

Mr. Goldstein: Q. December 6th, I believe it was—no, I have the wrong letter.

Mr. Scott: I think last time you had the 5th.

Mrs. Goldstein: I have it right here.

Q. December 5, on Friday, December 5, 1941, just a few days prior to the commencement of the trial of this case, did you see Mr. Urquhart

(Testimony of Leon Karl Fereva.)

at his office here in Sacramento, in the Ochsner Building, 719 K Street? A. I did.

Q. Did you have a conversation with him at that time pertaining to this accident, or the accident in question?

A. Pertaining to records of insurance policies.

Q. Did you at that time and place ask him, among other things—and I will just get to the last portion of this conversation—ask him if he did not remember that you reported to him the Dickinson accident a few days after it happened? Did you ask him that? A. Yes.

Q. Did he then reply, “No, I don’t remember; I have no recollection of it”; as that correct?

A. Similar to that, yes.

Q. Did you then say, “Bob, you must remember that, because I told it to you,” and he said, “No, I don’t remember it. Anyway, I couldn’t testify to that, because it would mean my job?”

A. Well, that is what Mr. Urquhart told me.

Q. Is it your positive testimony that he made the last statement to you, Mr. Fereva?

A. That is what I am here on the [196] stand for.

The Court: Q. What is the answer?

A. That is what I am here on the stand for.

The Court: Well, that is not an answer.

Mr. Goldstein: Q. Did he make that statement? A. Yes.

You may take the witness.

(Testimony of Leon Karl Fereva.)

Cross Examination

By Mr. Scott:

Q. Now, Mr. Fereva, early in the trial of this case you testified that on April 29, 1940, you received this plaintiff's exhibit, the original of Plaintiff's Exhibit No. 6, and signed the registry receipt for it? Correct, is it not? A. Yes.

Q. Now then, you also testified—that letter, Exhibit 6, you understand, is the letter calling your attention to the fact that the accident had occurred on February 25, and that no notice had been given to the company, and hence they were according you a defense with full reservation of rights? You understood that, did you not?

A. It was in writing there. [197]

Q. It was in writing? A. Yes.

Q. Now then, again, when the Kemp case came along, you received a similar letter, now Plaintiff's Exhibit No. 7, by registered mail, for which you receipted, is that not true?

A. Yes; I received several of them.

Q. Now then, again, on January 28th of this year, you received the notice, Plaintiff's Exhibit 8, by registered mail, did you not?

A. Yes, sir.

Q. You never made any reply whatever to the General Accident Fire and Life Assurance Company, to any one of these three letters, did you?

A. Not in writing, no.

Q. Never made any reply to the company whatever?

(Testimony of Leon Karl Fereva.)

A. Just through Mr. Urquhart, is all, not the company. I never corresponded with the company.

Q. You never made any reply to the registered letters that were sent you, did you.

A. So far as my knowledge, no.

Q. No. Now then, let me ask you something: Mr. Dickinson has just testified that, as I recall it, the first week in March he came to Lincoln, to your place of business, because his automobile was there, and he spoke to you, and you refused to let him have it on the ground that the insurance company was holding it?

A. No, that is wrong.

Q. That is not true, is it?

A. The insurance company—I believe it was tied up on account of traffic violations, or something.

Q. Now, as a matter of fact, Mr. Dickinson is entirely incorrect? You never told him that an insurance company was even remotely interested in his automobile, did you?

A. I don't believe I did.

Q. You never intimated to Mr. Dickinson that it was being held [198] under a stop order by an insurance carrier?

A. No; traffic violation, not insurance company.

Q. Yes. So that Mr. Dickinson is entirely incorrect in that?

Mr. Goldstein: Mr. Scott, be fair with the witness. Ask him what he told Mr. Dickinson, if you don't mind.

(Testimony of Leon Karl Fereva.)

Mr. Scott: Now, just a minute.

Q. Now, as a matter of fact, on the first Monday in March neither your automobile nor the Dickinson automobile was being held up in your garage by any insurance company whatever?

A. Not by the insurance company.

Q. Now, since sometime back in the early '30s you have been engaged in the insurance business along with your automobile business?

A. Yes, sir.

Q. Isn't that true? A. Yes, sir.

Q. Now, in connection with your automobile business you have a garage and repair shop, haven't you? A. Yes, sir.

Q. Now, it is true, is it not, that most of these vehicles that go up and down our highways are covered by collision and property damage policies——

Mr. Goldstein: Don't answer that, Mr. Fereva.

If the Court please, I object to that. That is not so. In this case neither one of these cars were covered by property damage insurance. That disproves the statement in the question. Mr. Dickinson did not have any insurance on the automobile; neither did Mr. Fereva. It is not a fact that most——

Mr. Scott: Just a moment. I have an object in asking the question, which will appear shortly. I don't like to disclose it in advance when I have a witness on examination.

The Court: Proceed.

(Testimony of Leon Karl Fereva.)

Mr. Scott: Will you read the question, Mr. Reporter? [199]

(Question read.)

A. I wouldn't say that; not more than 50 percent.

Mr. Scott: Q. All right. Let us get the 50 percent. In the course of your repair business, is it not true that a very large amount of your income was derived from payments by insurance carriers for damage done to this and that and the other car? A. A portion of it was.

Q. Yes. That portion of your business was fairly substantial, wasn't it? A. Yes, sir.

Q. In other words, when a car or two were damaged in a collision, it was quite usual for you—particularly if the accident happened within the reach of your towing activities—to have the repair job, and have the same paid for by one or another insurance company? A. That is correct.

Q. Now then, one of the most essential elements in that was this, was it not: that where the car was covered by insurance, or, where insurance was involved, you would first have an inspection of the car to ascertain the extent of the damage?

A. Yes, sir.

Q. In other words, insurance companies were unwilling to go and blindly authorize any repair until they had made an inspection, as it is called? True, is it not? A. Yes, sir.

Q. And you, as an insurance man, and as a repair and garage man, have for many years been

(Testimony of Leon Karl Fereva.)

accustomed to that phase of the insurance business?

A. Yes, sir; there are estimates made on them.

Q. And in this case the Dickinson car, if injured by reason of your negligence, you knew, as an insurance man, perfectly well, came under the damage features of your policy, isn't that true?

A. Yes.

Q. So that the nature and extent of the injury to the automobile itself was, to your knowledge as a repairer and insurance man, [200] something that it was highly important to have the insurance carrier check to ascertain how far, if at all, it was liable for that damage. True, isn't it?

A. True.

Q. In fact, that is elemental, is it not?

A. I beg your pardon?

Q. We might say that is elemental in your business, isn't it? A. Yes.

Q. All right. Now then, you knew in this case that the Dickinson car—possibly others, I don't know—the Dickinson car was injured in an automobile accident in which your tow car was involved, and that your tow car was covered \$5,000 for property? A. Sure.

Q. You knew all that. And yet, might I ask you for how long a time did you let that Dickinson car remain in your garage without it being checked up by any representative of your insurance carrier? A. I couldn't say on that, Mr. Scott.

Q. Let us put it this way: How long did the

(Testimony of Leon Karl Fereva.)

Dickinson car stay in your garage after you towed it there? A. Probably ten or twelve days.

Q. Ten or twelve days. And during that ten or twelve days you say you had started a conversation with Mr. Urquhart, is that correct?

A. Yes, sir.

Q. And the conversation had been broken off?

A. Yes, sir.

Q. And you never thought to complete it?

A. I never had the chance. In other words, Mr. Urquhart wasn't in, and I went no further with it.

Q. Counsel just called attention to the fact there is, in the telephone book here in Sacramento, Mr. Urquhart's name, as with Wentz & Erlin. You knew that, didn't you? A. Surely.

Q. During all of these many years when you and Mr. Urquhart had [201] been connected in the insurance business, you never had any difficulty in communicating with him, had you?

A. Not a bit.

Q. And yet you never called him up, and in the remaining 60 days you never again brought to his attention anything whatever regarding the accident?

A. I don't believe I saw Mr. Urquhart in that time. He was in my place several times; he was in the habit of leaving a note when he came in. He had been in and out several times.

Q. You don't remember even seeing him in that 60 days? A. No.

(Testimony of Leon Karl Fereva.)

Q. Assuming that the Dickinson car remained in your garage for a period of ten days, as you say or estimated, and during that time you never even told Mr. Urquhart that it was there in the garage, did you? A. I believe that is right.

Q. During that time you never interested yourself in seeing that your insurance carrier representative would inspect that car?

A. I believe that it right, too.

Q. And yet, over this interval of many years of your activity as a repair and insurance man, you knew that this was one of the elementals of the whole insurance business?

A. I had cars stay in my garage 10 days, 15 days, 30 days, and even 50 days, before an agent came in and checked it over.

Q. All right. Here is one that stayed 10 days, and yet you never drew anybody's attention to it at all, and allowed it to go away, is that right?

A. It was his car; yes.

Q. Yes. [202]

Mr. Scott: Q. You say that on December 5th you had a talk with Mr. Urquhart?

A. That is right.

Q. And at that time you suggested that you had said something to Mr. Urquhart not long after the accident? A. Yes, sir.

Q. Now, the accident happened in February, 1940—February 25th? A. That is right.

Q. This talk that you had with Mr. Urquhart was this December? A. That is right.

(Testimony of Leon Karl Fereva.)

Q. And that is the first time you took it up with Mr. Urquhart, isn't it?

A. Oh, no, no, Mr. Scott.

Q. And if Mr. Urquhart remembered, you said he told you, he would lose his job?

A. That is it.

Q. Didn't Mr. Urquhart tell you that if he lied about it he would lose his job? A. Oh, no.

Q. Didn't he tell you in substance that if he came here in court and told a story that wasn't true he would lose his position? A. Oh, no.

Q. In other words, this man, this friend of yours and your family, that you had known all these years, told you that he wouldn't come here, in substance, and tell the truth, because he might lose his job, is that right?

Mr. Goldstein: I object to that upon the ground that that is not the statement of the witness. The witness said what was said by Mr. Urquhart, and this is an entirely different thing.

Mr. Scott: I submit the record—— [203]

The Court: It is cross examination. Overruled.

The Witness: Repeat the question, Mr. Scott.

Mr. Scott: Will you read the question, Mr. Reporter?

(Question read.)

A. No, Mr. Urquhart told me that he didn't remember of my telling him that.

Mr. Scott: Q. Yes. Now, let me ask you this: When, on April—when on May 3, 1940, you received this Plaintiff's Exhibit 6, to which you made no

(Testimony of Leon Karl Fereva.)

reply, did you then call up Mr. Urquhart and say here in substance, "Mr. Urquhart, there is a lot of nonsense to this, because I told you within seven days after the accident happened"?

A. I was in to Mr. Urquhart's office and brought this down to him and turned it over to him, and this appears to be the same letter——

Q. Just a minute. That is my office copy You certainly didn't turn that over.

A. No. I said the writing appears to be the same.

Q. Did you go down to Mr. Urquhart's office on the day that you signed for this registered letter, namely, May 3, 1940, and tell him that that letter was a mistake, because you had already told Mr. Urquhart about this case, about these claims?

The Witness: Would you repeat that question?

Mr. Scott: Read the question, Mr. Reporter.

The Court: The reporter will read the question.

(Question read)

A. No, I didn't tell him it was a mistake.

Mr. Scott: Q. To. You had been a representative of some character or other of the General for over ten years, had you not? A. That is right.

Q. You had received from Wentz & Erlin commissions over all that [204] period of time?

A. Yes, sir.

Q. You never, however, took the telephone and called up Wentz & Erlin's office, or the claims department, or anybody else, and asserted that you had told Mr. Urquhart about this accident?

(Testimony of Leon Karl Fereva.)

A. No; that was in the course of business. It was never done.

Q. You never did it, did you? A. No.

Q. And you left this Plaintiff's Exhibit 6 unanswered, is that correct?

A. I wouldn't say unanswered. It probably was taken up with Mr. Urquhart.

Q. You don't remember that it was?

A. Not to my knowledge.

Q. As a matter of fact, the first time that you gave any intimation to the plaintiff, the General Accident Life Assurance Company, that you had had this talk with Mr. Urquhart, was when I took your deposition here in Sacramento on Saturday, May 10th of this year, isn't that true?

A. No, it is not. I talked to Mr. Urquhart many times before that.

Q. About this conversation?

A. About the conversation there? Only some of that; some of that conversation, yes, sir.

Q. Not about any notice that you gave Urquhart a week after this accident?

A. Oh, yes, Mr. Scott.

Q. Well, let me put it this way: How many times did you tell Mr. Urquhart that you had given a notice?

A. Why, once; I believe that is all. That is a few days after the accident.

Q. That was December 5th of this year, wasn't it?

A. No, that was away back in February or March.

(Testimony of Leon Karl Fereva.)

Q. In other words, the only time you ever talked to Mr. Urquhart on this subject was the time you had this talk outside of your garage, is that what you mean? A. After he visited my office.

Q. And the next time was in December of this year? [205]

A. When it was discussed I don't know

Q. The fact is, you don't remember that you ever discussed it with him?

A. Why, after the trial we discussed it.

Q. You never raised this point, did you, until after this letter saying Mr. Desmond was instructed to turn the papers back to you, and that you were to get other counsel, isn't that true? That is true, isn't it?

A. I talked to Mr. Urquhart before that? Why, yes——

Q. Now, just a minute. Let us see if you and I can find each other on some common meeting ground, Mr. Fereva, because, after all, that is our only object. Let's see once more if I can get the thing straight. You testified that about a week after the happening of the accident in front of your place you started to tell Mr. Urquhart about this and then were interrupted by customers and he went away. A. That is correct.

Q. All right. Then, as I gather, you testified also that you had another talk with Mr. Urquhart on December 5th of this year; that is this month.

A. Why, I had talked about that before. I went to his office when the papers were served; I brought

(Testimony of Leon Karl Fereva.)

them down. That was a month and a half afterwards.

Q. Yes. That is the time you went to Mr. Henretty's? A. Yes, that is right.

Q. All right. Now, aside from that occasion, the occasion following the accident, and the trip to Mr. Henretty's office, and the talk on December 5th of this year, did you, on any occasion, suggest to Mr. Urquhart that you had had such a conversation with him in front of your place of business?

A. I wouldn't answer that, because Mr. Urquhart had been in my office many times; we had talked about the trial, and I wouldn't want to answer yes or no on that. [206]

Q. Mr. Fereva, in fairness to you, let me put it another way: You were quite concerned, were you not, as an insurance man, over receiving this Plaintiff's Exhibit No. 6 on the 3rd day of May, 1940? A. I may have been, yes.

Q. Yes. You were, and remained for a long time thereafter, an agent doing business with Wentz & Erlin? A. Yes, sir.

Q. You were, and I presume still are, an intimate friend of Mr. Urquhart's?

A. I hope I am.

Q. And knew Mr. Henretty, and knew Mr. Henretty almost as long as Mr. Urquhart?

A. Not personally, no. I never knew Mr. Henretty personally.

Q. You knew him as the trouble man, investigating and all that? A. Yes, sir.

(Testimony of Leon Karl Fereva.)

Q. Now then, in spite of your close relationships with Urquhart and with the company, or with Wentz & Erlin, it never occurred to you, did it, to call the company's attention further, or Urquhart's attention, or the attention of Mr. Wentz, the attention of Mr. Henretty, or anybody else, to your alleged conversation had in front of your garage?

A. Not unless I talked it over with Mr. Urquhart in my place of business.

Q. You said you don't remember that.

A. I am not so sure, because we talked the case over many times.

Q. But you don't remember bringing that up until December 5th, when you came in to ask about producing some papers, and how he would testify in this case?

A. Yes, I believe I talked to Mr. Urquhart upon that before, and he gave practically the same questions he did here; he didn't remember me telling him.

Q. Now then, so we may have it clear, do you remember where you and Mr. Urquhart were on such occasion?

A. Why, probably in my office. [207]

Q. Do you remember any other person besides yourself and Mr. Urquhart, anyone in the world, who was present and heard such a talk?

A. I wouldn't say that, because there were many people in and out of the office.

Q. I am asking you if you can remember; if you can name anybody.

(Testimony of Leon Karl Fereva.)

A. No, I do not, Mr. Scott.

Q. This accident happened, didn't it, the original accident happened following a very stormy night in February? A. It was very stormy.

Q. And you had more than an abundant supply of rain? A. Yes, sir.

Q. And you had been called because of the conduct of some allegedly drunken driver, to go out and tow some car? A. That is correct.

Q. And you got out there at a very early hour, before the sun was up?

A. Well, just before daylight.

Q. And the accident happened while your tow line was attached to this unknown car, whoever it was? A. Yes, sir.

Mr. Goldstein: If your Honor please, I don't like to object and be overruled by the Court, but your Honor will recall that not a bit of this examination is in answer or cross examination of what I asked the witness. Not a bit of it. I don't want to object——

Mr. Scott: If your Honor pleases——

The Court: Mr. Goldstein has the floor now, Mr. Scott.

Mr. Goldstein: Mr. Scott is now going into matters regarding the accident, or what happened, and all of this is immaterial. There was an accident took place, and a trial was had on the issues involved in it, which resulted in a judgment, and it is a valid and binding judgment, and the company is bound by it. We [208] did not go into any-

(Testimony of Leon Karl Fereva.)

thing regarding the accident, and this is not cross examination at all. I dislike very much to be overruled by the Court, and that is why I have been standing here not making any objections——

The Court: The Court can only rule as the objections are made.

Mr. Goldstein: Yes. Your Honor has been very eminently fair and has allowed us to go into anything that might have a bearing on the case, but this has gone too far now, and I am going to object to any further questions along this line of testimony, on the ground that it is not proper cross examination, highly immaterial, and not connected with the case.

Mr. Scott: I think I can show your Honor in a question or two it is not only relevant, but very material, and is cross examination. I don't like to explain in advance to a witness what I am trying to develop.

The Court: Proceed.

Mr. Scott: Will you read the question, Mr. Reporter?

(The last question and answer were read by the reporter.)

Mr. Scott: Q. Now, at that moment in your activity, before you started towing, you had placed lights upon the highway?

A. Yes, sir.

Q. To warn oncoming traffic. Now then,——

The Court: I don't think Mr. Goldstein entered upon that examination——

(Testimony of Leon Karl Fereva.)

Mr. Scott: If your Honor pleases, he has——

The Court (continuing): ——with this witness today. He did before.

Mr. Scott: He did before, yes.

The Court: Did you cross examine the witness on that point [209] before?

Mr. Goldstein: If your Honor please, I never asked him a question about that today.

Mr. Scott: He asked this witness a line of questions tending to show that he had cooperated, he had gotten all the witnesses, that everything was hunky-dory, and it didn't make any difference, in substance, whether he gave this notice or not. That is what I am directing the cross examination to. I will not be very long, if your Honor will permit me to do it.

(Argument.)

The Court: Proceed.

Mr. Scott: Will you read the question, Mr. Reporter?

(Unfinished question read.)

Mr. Scott: Evidently all this argument was over nothing.

Q. As a matter of fact, these cars piled up on one side of the highway, the safety strip, or the shoulder?
A. That is right.

Q. As a matter of fact, there were a great many markings there on that muddy, rainy road, and the surroundings? There were a lot of footprints and markings?
A. Well, we were towing the car.

(Testimony of Leon Karl Fereva.)

Q. There were tire marks, weren't there?

A. Yes.

Q. And 60 days afterwards, the weather having recovered to normal, not one of those marks remained, did they?

A. Oh, yes, they did.

Q. But it was impossible to show by photograph how the cars had come together? True, was it?

A. That may be possible; the change of the seasons——

Q. Now, that is true; you waited 60 days from this rainy night?

A. Yes.

Q. Now, another thing: You went with Mr. Henretty, and you, [210] yourself, attended the taking of the statements of some witnesses?

A. Yes, sir.

Q. You remember, don't you, that because of the delay the witnesses expressed themselves as confused; some witnesses had your flares on one side of the road, some on the other?

A. They were on both sides.

Q. They were on both sides, they couldn't say which, isn't that true?

A. I would say not.

Q. Wasn't it true they explained, just as Officer La Porte explained, that had you come earlier they would have been very glad indeed to assist you, but because you were late they could not remember?

A. Why, Mr. La Porte was on the scene 20 or 25 minutes afterwards, and Mr. Smart was on the scene 10 or 15 minutes afterwards?

(Testimony of Leon Karl Fereva.)

Q. But Mr. La Porte, 60 days afterwards, said to you that he could not remember the setup there, and said he should have been spoken to before, isn't that true? A. No, sir, it is not.

Q. Now then, this tow car, what did you do with that after the accident?

A. Why, one of the garages in town towed it back to my place of business.

Q. Was that damaged? A. Yes, sir.

Q. Did you have it repaired? A. Yes.

Q. Where?

A. In my own place of business.

Q. When was it repaired?

A. It was five to twelve days, during the length of time it was being repaired.

Q. So that 12 days after the accident your own car was repaired, is that correct? A. Yes.

Q. And in the meantime, just as in the Dickinson car, you never called the attention of Mr. Henretty or Mr. Urquhart that you were repairing the evidentiary damage to your own car? [211]

A. Why, Mr. Henretty saw the Dickinson car. Presumably he saw my tow car.

Q. He certainly didn't see it 12 days after the accident. A. I wouldn't say so.

Q. He didn't see it until after the 60-day delay had occurred and you received your letter, Plaintiff's Exhibit 6? A. Yes.

Q. In other words, Henretty didn't see it until after you came to his office on April 25?

A. I think that is right.

(Testimony of Leon Karl Fereva.)

Q. So that had already been repaired and fixed up?

A. Yes. We were in a hurry to get it repaired.

Q. But it didn't occur to you to notify the company, did it?

A. You mean on the repair of my tow car?

Q. Yes.

A. No, I didn't notify them on that.

Mr. Scott: I think that is all.

Mr. Goldstein: Are you finished?

Mr. Scott: For the time being.

Redirect Examination

By Mr. Goldstein:

Q. Mr. Fereva, Mr. Scott asked you as to what conversation you had with Mr. Dickinson about a week after the accident, on February 25, 1940. Will you please state that conversation, the whole of it?

A. I think Mr. Dickinson——

Mr. Scott: Just a minute. Objected to as hearsay, irrelevant, immaterial and incompetent.

Mr. Goldstein: If the Court please, Mr. Scott asked for a part of the conversation, and I have the right, under the law, to bring out the entire conversation.

(Argument.)

Mr. Goldstein: I submit it.

The Court: The objection is overruled.

Mr. Goldstein: Q. Answer the question. [212]

The Witness: Repeat the question, Mr. Goldstein.

(Testimony of Leon Karl Fereva.)

Mr. Goldstein: Q. When Mr. Dickinson came in there some week or ten days, or thereabouts, after the 25th of February, 1940, he said he had a conversation with you? A. Yes, sir.

Q. What did he ask you at that time, and what did you say?

Mr. Scott: Same objection.

The Court: The objection is overruled.

A. He asked me what I intended to do with his car, and the doctor bills in Lincoln. I told him I had nothing to do with it; it was turned over to the insurance company. Those were practically the words I told Mr. Dickinson.

Mr. Goldstein: Q. You remember making that statement to him, do you?

A. I do.

Mr. Scott: Will you read the answer? The witness spoke so low I couldn't hear him.

(The answer referred to was read by the reporter.)

Mr. Goldstein: Q. Prior to the time that he came there, had you talked to Mr. Urquhart?

A. I had.

Q. So that the visit with Mr. Dickinson was subsequent——

A. It was after my conversation with Mr. Urquhart.

Q. Do you remember him mentioning anything about his wife? A. Mr. Dickinson?

Q. Yes.

(Testimony of Leon Kari Fereva.)

A. Our conversation was very brief. Mr. Dickinson's disposition wasn't very good when he was in the garage, and our conversation was very brief.

Q. But you do remember the portion of the conversation you just told the jury about?

A. I do.

Mr. Goldstein: That is all, your Honor.

Mr. Scott: No further questions.

Mr. Goldstein: Your Honor, I overlooked one matter. Just one [213] minute. I overlooked one question.

Q. Will you take the stand again, Mr. Fereva? Mr. Fereva, do you recall the day that the motion for a new trial was argued in the Superior Court of Placer County, namely, January 23, 1941, some five days before this letter was written to you by Mr. Desmond?

A. I wouldn't say, Mr. Goldstein; I can't place the date.

Q. Now, just a moment. Do you recall the day in January, 1940, when Burton Goldstein, my son, and myself, came from the Superior Court at Auburn, to Lincoln, in the afternoon, after hearing in the court in the case?

A. Yes, sir; it was just about dusk.

Q. Just about dusk. And I will ask you if you now recollect that the motion for a new trial was argued, when Mr. Desmond was there in court, Mr. Buton Goldstein, my son, and myself? Do you recall that? A. Yes.

Q. Did you on that occasion after dusk in the

(Testimony of Leon Karl Fereva.)

afternoon of January 23, 1941, and prior to the time this registered letter was mailed to you, dated January 28, 1941, state to my son and myself that conversation you had with Mr. Urquhart, and the report you gave of the accident?

Mr. Scott: Just a moment. I object to that as incompetent, irrelevant and immaterial, and hear-say.

Mr. Goldstein: I submit it is proper examination in connection with the testimony elicited by Mr. Scott in relation to the letter. I am not asking for the conversation; I am asking whether he made the statement. He was still the agent for the company.

The Court: Overruled.

Mr. Scott: If your Honor please, I apprehend that the fact that he was still the agent of the company does not give the assured of one of our policies the authority to make a statement that would be binding to one of the two other parties. I object [214] to it as incompetent, irrelevant and immaterial.

Mr. Goldstein: May I make the further statement very respectfully: It is very patent that the elicitation of the testimony by Mr. Scott was to the effect that the first time that this assured under the policy conceived the idea of making any statement in connection with his having notified orally Mr. Urquhart, the agent, was after this letter or repudiation was received by him under

(Testimony of Leon Karl Fereva.)

date of January 28, 1941. Now, to rehabilitate the matter, your Honor, I am asking whether he did not make that statement to my son and myself on the afternoon of January 23rd, immediately after the motion for a new trial was denied by Judge Landis of Placer County.

The Court: Proceed.

By Mr. Goldstein:

Q. Do you remember that?

A. Yes, I remember it.

Q. Did you at that time fully explain the circumstances of the notice you gave to Mr. Urquhart, and how you gave it to him?

Mr. Scott: Just a moment. Objected to as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

A. I made it very brief, yes.

By Mr. Goldstein:

Q. Was it substantially the same thing that you testified to before this jury? A. Yes.

Mr. Scott: Same objection.

The Court: Same ruling.

Mr. Goldstein: That is all.

(Witness excused.) [215]

Mr. Goldstein: If your Honor pleases, Mr. William Kemp is one of the defendants in this action, and as your Honor is familiar from reading the pleadings, he is a named defendant because he has an action pending in the State Court arising out of the same accident. The attorney of record in this case representing Mr. Kemp is Mr. Erling

S. Norby, of Marysville. Mr. Norby was here the first day, and perhaps came in for a minute or two at other days. As a matter of personal courtesy, your Honor, I desire to protest the record as far as this defendant is concerned, although I am not his attorney, and at this time I would like to ask that every bit of evidence that was offered here in behalf of the Defendants Fereva and Dickinsons be applicable to Mr. Kemp, and he desires to have the Court let the record show that for the purposes of this trial, and for the purposes of protecting his interests, that I appear as associated counsel with Mr. Norby.

Is that you wish, Mr. Kemp?

Defendant Kemp: Yes.

Mr. Scott: If your Honor pleases, I am a little familiar with the circumstances, and I may say this: that with the same spirit of fairness I am willing to stipulate that all of the evidence introduced and received in the case be deemed to have the same force and effect with reference to the Defendant Kemp as it would have with reference to the Defendants Dickinsons or to the Defendant Fereva, subject, however, to my time-honored exceptions and objections which are in the record.

Mr. Goldstein: That you very much, Mr. Scott. The defendants rest, your Honor.

(Defendants rest) [216]

(Thereupon an adjournment was taken until monday, December 29, 1941, at 10:00 o'clock a. m.) [217]

Monday, December 29, 1941

Ten O'Clock A. M.

The Clerk: General Accident Health and Fire Assurance Corporation vs. Dickinson.

Mr. Scott: Ready.

Mr. Goldstein: Ready.

The Court: The Clerk will call the roll of jurors.
(Roll called.)

The Clerk: The jurors are all present, sir.

Mr. Scott: The plaintiff rests, your Honor.

Mr. Goldstein: The defendants rest, your Honor.

The Court: You may proceed with the argument.

(Mr. Scott made an opening argument to the jury on behalf of the plaintiff.)

The Court: Ladies and gentlemen of the jury, we will take the usual recess for fifteen minutes. Remember the admonition heretofore given you by the Court. You may now retire.

(Recess.)

(The following proceedings were had outside the presence and hearing of the jury:)

Mr. Goldstein: I just want to bring up a matter before the Court, Mr. Scott.

If your Honor pleases, I am rather surprised—a matter came to my attention after the address made by Mr. Scott which I think I should bring before the Court, and I desire to make a motion after I am through presenting the situation.

Your Honor will recall that in this case Mr.

Erling Norby represents Mr. William Kemp, who is the plaintiff in a personal injury suit pending in the Superior Court of Butte County. Very unfortunately Mr. Norby has at no time consulted with either Mr. [218] Hogle or myself in this case. We didn't have the benefit of anything he knew in the case, and it was just during this recess that I learned that Mr. Henretty, representing the plaintiff corporation, called upon Mr. Kemp in Yuba City within two or three weeks after this accident to take his statement and Mr. Kemp refused to talk to him and advised him that he had turned the case over to Mr. Norby and Mr. Norby had advised him not to give any statement unless it was taken at his office. At that conversation in Yuba City Mr. Kemp's wife was present and can corroborate it.

Now, if the Court pleases, I am quite surprised and taken back, and while I know it is somewhat unusual, I am going to move the Court to set aside the submission of the case and give me the opportunity of introducing this additional evidence, and in line with that I have no objection to Mr. Scott, if he desires, to have time to combat it, or that the Court take any steps the Court sees fit. But your Honor will recognize, this being a case involving both equity and law, that when a matter of that nature comes to the knowledge of counsel it is my absolute duty to bring it to the attention of the Court, because we are trying to get the facts.

The Court: Well, what point would that have in this case?

Mr. Goldstein: Mr. Henretty said he never knew anything about the accident and didn't go up there until sixty days later. It would be absolutely contrary to the testimony he gave in this court. That is how the matter came up, your Honor.

Mr. Scott: May I state this to your Honor, in all due respect to counsel, and, of course, it isn't meant as any reflection on him: I have very reason to believe that the statement conveyed to counsel is utterly untrue. I have been [219] with this case now almost since it first came up. I don't believe there is a scintilla of truth in that.

On the other hand, I wouldn't want to be in the position of refusing to entertain it if it be true. My judgment, after all, is not the judgment of this Court; but counsel must admit that any such statement as that coming now is at least a surprise to me, and I would decline to have the case reopened now unless you want to take a recess and come back again later. This business of ganging up that way——

The Court: Well, it is too late now. Motion denied. Call the jury.

(The jury returned into court.)

The Court: Will counsel stipulate that all the jurors are present and in their proper places?

Mr. Scott: Yes.

Mr. Seawell: Yes, your Honor.

The Court: You may proceed, Mr. Goldstein.

(Mr. Goldstein proceeded with his argument on behalf of the defendants.)

The Court: It is twelve o'clock. Ladies and gentlemen of the jury, we will now recess until half past one this afternoon. Will you please remember the admonition heretofore given you by the Court? You may now retire.

(Thereupon an adjournment was taken until 1:30 o'clock P. M. this date.) [220]

Monday, December 29, 1941—Afternoon Session
1:30 O'Clock P. M.

(Mr. Goldstein concluded his argument to the jury on behalf of the defendants.)

(Mr. Scott made a closing argument to the jury on behalf of the plaintiff.)

CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury, if I may now have your attention I will instruct you as to the law of the case, in the light of which you will determine what your verdict shall be.

This action was commenced by the General Accident Fire and Life Assurance Corporation, Ltd., for declaratory relief and to declare a certain automobile contract for liability insurance cancelled and of no force and effect, and for an injunction restraining the defendants, Charles Gromer Dickinson, Doris May Dickinson, and William Kemp, from taking any steps or proceedings in the State Courts as against said plaintiff company under said policy of insurance. The insurance policy in question was issued to the Defendant L. K. Fevera,

doing business under the firm name and style of "Fevera Chevrolet Company" at Lincoln, Placer County, California, and was dated December 6, 1939, to be in full force and effect from December 16, 1939, to December 16, 1940. The plaintiff company claims and alleges that Defendant L. K. Fereva had an accident which occurred in Placer County, California, on the 25th day of February, 1940, but that he failed to make any report of such accident to the company until on or about April 26, 1940, and for that reason the policy issued to him for public liability is of no force and effect and should be cancelled, res- [221] cinded and declared null and void insofar as the accident is concerned involving the Defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, and William Kemp.

The Defendant L. K. Fereva has denied the claims of the company that he failed to give notice of the accident as claimed by them and on the contrary has set up in his answer that he did give such notice within fifteen days from the date of the accident. The Defendants William Kemp, Charles Gromer Dickinson and Doris May Dickinson, by their answer, also deny the claims of the company that the Defendant L. K. Fereva, failed to give notice of the accident as claimed by them. And these defendants also assert in their answer that the Defendant L. K. Fereva, notified the plaintiff company of said accident within 15 days time thereafter. And as a cross-claim Defendants Charles Gromer Dickinson and Doris May Dickin-

son have set up their complaint against the said General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, alleging that on the 7th day of December, 1940, they obtained a judgment in the Superior Court of the State of California, in and for the County of Placer, against said L. K. Fereva, doing business under the firm name and style of "Fereva Chevrolet Company," for the sum of Five Thousand Dollars and costs in the sum of Two Hundred Sixteen and 65/100 Dollars, no part of which has been paid and all of which is due, with interest thereon at the rate of seven per cent per annum from said 7th day of December, 1940; and said defendants further allege that at the time of the rendition of said judgment said Defendant L. K. Fereva carried a liability insurance policy with the plaintiff company and that by the terms thereof said company was obligated to pay to said defendants, Charles Gromer Dickinson and Doris May Dickinson, the whole of said sum of Five Thousand Two Hundred Six-[222] teen and 65/100 Dollars, with interest thereon at the rate of seven per cent per annum from the 7th day of December, 1940; the Defendant William Kemp, admits that he is the plaintiff in a personal injury action pending in the Superior Court of the State of California, in and for the County of Butte, as alleged in plaintiff's complaint. And in addition thereto an affirmative defense against plaintiff is set up by the defendants Charles Gromer Dickinson and Doris May Dickinson and William Kemp to the effect that plaintiff waived the pro-

vision contained in condition 7 of the insurance contract in question requiring that written notice of the occurrence of the accident be given by the insured, L. K. Fereva, to the corporation as soon as practicable and it is claimed by said defendants that as far as these defendants are concerned all of the provisions of said condition 7 of the insurance contract in question, relative to the giving of a written notice of the accident under the terms of the policy were duly waived by said plaintiff corporation, and that said plaintiff corporation is now, as far as defendants Charles Gromer Dickinson, Doris May Dickinson and William Kemp are concerned, estopped from claiming that no proper notice of the accident relative to said contract of indemnity insurance and that no proper compliance with the terms and provisions of said condition No. 7. of said contract of insurance was made by the insured, L. K. Fereva, and hence that said plaintiff corporation is liable to said defendants on said insurance contract.

It is solely within your province to judge the effect and value of the evidence addressed to you. You are, however, not to judge the effect of the evidence arbitrarily, but you are to be guided by the instructions of the court in weighing the evidence and in determining the facts to be drawn from the evidence; [223] and in considering your verdict, you will apply the law as the Court gives it to you to the facts as you find them. You are not bound to decide in conformity with the declarations of any number of witnesses, which do not

produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds. A witness is presumed to speak the truth. The presumption, however, may be repelled by the manner in which he or she testified, by the character of his or her testimony or by his or her motives, or by contradictory evidence. Where a witness has testified wilfully false in one particular, not through honest mistake, but with intent to deceive, you are to treat all of his or her testimony with distrust, and you may reject it all unless you believe that in other particulars he or she has spoken the truth. You are the exclusive judges of the credibility of witnesses.

This case presents several questions or propositions of law, and it is the duty of the Court to instruct you fully upon each proposition. Some propositions may require several instructions. You must not allow yourselves to be influenced, however, as to any question of law or fact by the number of instructions given you upon such question. The Court does not intend to stress the relative importance of any question of fact or law either by the number of instructions given upon a particular proposition, or by the order in which the instructions are given. In arriving at your verdict in this case you must not single out any one instruction or any particular group of instructions; you must consider all of the instructions together. You must not assume the existence of any law not stated in these instructions, nor speculate or question as to what the law is. If during

your deliberations doubt should arise in your minds as to what the law is upon any [224] given question you should so advise the Court, and the Court will then again read the instructions covering the question or questions as to which you may be in doubt.

It is provided in condition No. 7 of the policy of insurance issued by the plaintiff herein, with reference to notice of accident, claim or suit, that upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

You are instructed that such notice will be deemed to have been given in conformity with the requirement in the said condition, that the same be given as soon as practicable, if the notice is actually given within twenty days from the happening of the casualty.

By the terms of section 551 of the Insurance Code of the State of California it is provided as follows: "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid."

Where notice of an accident is required to be made as soon as practicable after the happening thereof, notice given to the plaintiff sixty days thereafter is as a matter of law insufficient.

Persons injured in an automobile accident are bound by the limitations contained in the policy of insurance issued to the [225] insured, and a breach of a condition of the policy for the giving of written notice as soon as practicable after the occurrence of the accident committed by the insured person or persons against the insurance carrier, provided, however, that the carrier has not waived said provision in the policy and is not estopped to assert the same.

The principle of estoppel may be defined as follows:— Where a person tacitly encourages an act to be done he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induce the party to change his position, so that he will be peculiarly prejudiced by the assertion of such adversary claim. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

“Waiver” is defined to be the intentional relinquishment of a known right. Waiver may be either express or implied. Conduct on the part of plaintiff insurance company which will warrant the inference that it intended to waive a provision of

the policy, and which deceived the insured so as to prevent his fulfillment of the terms of the contract may amount to a waiver.

You are instructed that an insurance company like any other principal acting through agents may limit their powers, and that this was done by the plaintiff in the policy of insurance issued by it to Mr. Fereva. The provision to which reference is made is as follows: "No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the cor- [226] poration from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by indorsement issued to form a part hereof, signed by the United States Manager." When the defendant Fereva accepted the policy it became the contract between him and the plaintiff company, and he was charged with knowledge of its terms, among others the limitations upon the power of the agents of the plaintiff company. However, this provision, like any provision of the policy, may be waived or the plaintiff company may be estopped to assert it. It is a question of fact for you to determine from the evidence and under the instructions of the Court, whether this provision has in fact been waived by the plaintiff company, or whether plaintiff company is estopped to assert it.

A local agent who is clothed with the general power to solicit and consummate contracts of insurance within a certain territory stands in the

stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent.

General agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the company themselves, and can therefore waive conditions and forfeitures.

As a general rule the powers of an agent of an insurance company are governed by the general laws of agency. His powers are varied by the character of the functions he is employed to perform. He may be a general agent with general powers, or his powers may be limited by the company; or he may be a special agent with authority limited to a specific transaction. In any event, [227] an insurance agent, whether general or special, possesses such powers as have been conferred by the company, or as third persons have a right to assume that he possesses in the circumstances of the case; and as a general rule his powers, as to those dealing with him, are determined by the nature of the business entrusted to him and are *prima facie* coextensive with its requirements.

An insurance company, like any other principal, may limit the powers of its agents. Where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes the contract between him and the company and he is

charged with knowledge of its terms, among others, the limitations upon the power of the agent of the company. The authority of an agent to effect a waiver in the face of a limitation denying his power to waive warranties or conditions is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regraded as having the power to waive conditions and forfeitures. As to the character of agents authorized to waive such conditions, the rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and to cancel policies.

Notice to an agent who is under no duty to transmit the information to his principal, or to any other agent, and who has no connection with the transaction to which the notice relates, is not notice to the principal.

The rule that notice to an agent is notice to his principal is [228] not applicable unless the notice has reference to business in which the agent is engaged under authority from the principal, and is pertinent to matters coming within that authority; and hence a principal is not affected with knowledge which the agent acquires while not acting in the scope of his employment or which re-

lates to matters not within the scope of his authority unless the agent actually communicates his information to the principal.

The rule that notice to an agent is notice to the principal has no application with reference to the knowledge of an agent who deals for himself with the principal; and in this case the knowledge of Mr. Fereva obtained by him at the time the automobile accident occurred is not imputed to the General Accident Fire and Life Assurance Corporation.

If you find from the evidence that the plaintiff, General Accident Fire and Life Assurance Corporation, promptly on receipt of summons and complaint from its assured L. K. Fereva did accept the same and agreed to handle the defense under a full reservation of all of its rights under its policy of insurance because of the failure of said Fereva to report the accident promptly and in accordance with policy provisions, and with the further stipulation that any action taken in the handling, investigation or defense of said action was not to be construed as a waiver of said rights, and that the said L. K. Fereva expressly or impliedly agreed to the same and consented to the defense of said action by the said plaintiff under said stipulation, then the said plaintiff did not waive its right to assert in the present case its claim of the failure, if any, of said Fereva to give proper notice of the said accident.

The statutes of the State of California require that policies of liability insurance contain a provi-

sion giving to an injured [229] person who has secured a judgment against the insured the right to bring an action against the Insurance Company "on the policy and subject to its terms and limitations." The effect of this statute is to give to an injured claimant a cause of action against an insurer for the same relief that would be due to an insured seeking indemnity and reimbursement after the judgment had been satisfied by him. The cause of action is no less, but also it is no greater; assured and claimant both are bound by the conditions of the insurance contract.

You are further instructed that under condition 7 of the policy of insurance in question it was provided that written notice should be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable upon the occurrence of the accident. In this case defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, and William Kemp have set up an affirmative defense against plaintiff company to the effect that said plaintiff company waived the provision contained in said provision 7 of the insurance contract in question and that further, said plaintiff insurance company is estopped from claiming or asserting that no written or other proper notice of the accident in question was given to it by the insured L. K. Fereva. It is admitted without contradiction that the policy of insurance in question was in force on February 25, 1940. Accordingly, the main question presented under the special defense of defendants the Dickin-

sous and Kemp is whether there was a waiver of the giving of written notice by L. K. Fereva and whether the plaintiff is estopped from setting up the claim as against said defendants, that no proper notice of the accident was given plaintiff by Fereva. If you find from the evidence herein that within a period of [230] twenty days after the happening of the accident, the insured L. K. Fereva gave oral notice to Wentz and Erlin, the general agents and attorneys in fact of plaintiff company through one R. F. Urquhart, their agent in Sacramento, and that for many years prior thereto said L. K. Fereva was an agent of said plaintiff corporation and in the event of any report of an accident it was the practice and custom on his part, with the consent and approval of said Wentz and Erlin and said R. F. Urquhart to give notice orally of any accident on all policies of insurance issued to, or written by, or through said L. K. Fereva and thereupon the same was duly recognized by plaintiff as a sufficient notice and compliance with the terms of the indemnity policies of insurance requiring written notice of an accident to be given by the insured, and that the same became and was the accepted mode, system and custom of giving notice of claims or of accidents, or of any loss as between said plaintiff corporation and said L. K. Fereva on any policies of insurance issued to, or written by or through him; and if you further find that for a period of many years prior to the 25th day of February, 1940 and thereafter up to and including the 1st day of July, 1941, said plaintiff

corporation allowed and permitted said R. F. Urquhart, district representative of Wentz and Erlin, and said Wentz and Erlin themselves permitted and allowed said R. F. Urquhart to hold himself out to said defendant L. K. Fereva as the person to whom such oral notice of any accident or any indemnity policy issued to said L. K. Fereva, or others by and through him should be given, and that said condition continued and was consistently followed by said L. K. Fereva in the place and stead of giving written notice, and that said L. K. Fereva always gave notice orally in the same manner as he did in the instant [231] accident under condition 7 of said policy; and if you further find that said L. K. Fereva relied upon the actions and conduct of said plaintiff company relative to said notice and the manner and form in which he had been in the habit of giving the same, then I instruct you that such conduct on the part of the plaintiff insurance company warrants the inference that it intended to and waived the provision of the policy as to written notice under condition 7 and warrants the inference that said plaintiff corporation is now estopped from claiming any benefit by or through the provisions pertaining to written notice of accident referred to in said condition 7 of said contract of indemnity insurance, and is estopped from setting the same up as a defense to the action as far as the defendants are concerned, and your verdict in the event you find such waiver or estoppel should be in favor of the defendants and against the plaintiff herein. On the other hand, unless you find such

a waiver or such an estoppel, it is your duty to return a verdict in favor of the plaintiff.

You are instructed that in this case under condition No. 7, of the policy issued by the plaintiff to L. K. Fereva, the duty rested upon Mr. Fereva, the defendant, as an insured, under the policy, to give written notice of the happening of the accident to the plaintiff as soon as practicable after the occurrence thereof, and if you find from the evidence that he did not give such written notice until sixty days after the occurrence, and if you further find from the evidence and under the instructions of the Court that there was no waiver of the above mentioned condition of the policy and also that plaintiff is not estopped to assert said condition of the policy, then your verdict herein must be in favor of the plaintiff and against the defendants and cross-complainants. [232]

When you retire to your jury room to deliberate upon your verdict, you will select one of your number as foreman and he will sign your verdict for you, whereupon you will return into court with the same. Your foreman will represent you as your spokesman in the further conduct of this case in this court.

Any exceptions?

Mr. Scott: I would like, if your Honor please, to note an exception to the refusal to give plaintiff's requested instructions 2 to 7.

I assume that they might have been refused as argumentative, but I wish to note an exception for the sake of the record.

I would also like to note an exception to instruction 21, the very long one which your Honor just read, on the ground that in this case Fereva's answer does not set up estoppel or waiver, and there is nothing in the nature of the case that can show an estoppel, and in the absence of that defense by Fereva in this case that instruction is, in my judgment, rather confusing and has a tendency to mislead.

Mr. Goldstein: If your Honor pleases, the defendants are content with the instructions. We have no exceptions, but I want to call your Honor's attention to the misreading of one word in Plaintiff's Instruction No. 11, on page 2. Your Honor misread just one word and I didn't want the record—on page 2 of Plaintiff's Instruction No. 11. Your Honor said, "to hold himself out to said defendant L. K. Fereva as the person to whom such oral notice of any accident or any indemnity policy"—the word there is "on any indemnity policy." I think the record shows your Honor said "or".

The Court: What line is that?

Mr. Goldstein: It isn't numbered. It is right in the [233] center of the page. It starts with the word "accident."

The Court: "Notice of any accident"?

Mr. Goldstein: Yes. Your Honor said "or any indemnity policy issued." It should be "on any indemnity policy issued to said L. K. Fereva." I put the word "on" here; your Honor said "or." The conjunction is not correct there. "Of any accident on any indemnity policy."

The Court: Let me see your copy.

Mr. Scott: It is 21, your Honor, the one that I was discussing.

Mr. Goldstein: Court's instruction 21.

The Court: You say I used the word "or"?

Mr. Goldstein: "Or" instead of "on."

The Court: It is written like "or", but it is true it is "on." Do you wish me to re-read it?

Mr. Goldstein: Your Honor, I believe perhaps it would be in order, in view of the fact there was one other place also I would like to call your Honor's attention to in that.

The Court: I will read the paragraph.

Mr. Goldstein: Yes.

The Court: I will re-read the paragraph in which this mistake was made.

If you find from the evidence herein that within a period of twenty days after the happening of the accident, the insured L. K. Fereva gave oral notice to Wentz and Erlin, the general agents and attorneys in fact of plaintiff company through one R. F. Urquhart, their agent in Sacramento, and that for many years prior thereto said L. K. Fereva was an agent of said plaintiff corporation, and in the event of any report of an accident it was the practice and custom on his part, with the [234] consent and approval of said Wentz and Erlin and said R. F. Urquhart, to give notice orally of any accident on all policies of insurance issued to or written by, or through said L. K. Fereva and that thereupon the same was duly recognized by plaintiff as a sufficient notice and compliance with the

terms of the indemnity policies of insurance requiring written notice of an accident to be given by the insured, and that the same became and was the accepted mode, system and custom of giving notice of claims or of accidents, or of any loss as between said plaintiff corporation and said L. K. Fereva on any policies of insurance issued to, or written by or through him; and if you further find that for a period of many years prior to the 25th day of February, 1940 and thereafter up to and including the 1st day of July, 1940, said plaintiff corporation allowed and permitted said R. F. Urquhart, district representative of Wentz and Erlin, and said Wentz and Erlin themselves permitted and allowed said R. F. Urquhart to hold himself out to said defendant L. K. Fereva as the person to whom such oral notice of any accident on any indemnity policy issued to said L. K. Fereva, or others by and through him should be given, and that said condition"——

Do you want me to read further than that?

Mr. Goldstein: No.

The Court: Now do you wish to note any exception?

Mr. Goldstein: I have no exception.

The Court: We have prepared for your convenience——

Mr. Scott: Pardon me, your Honor. Might I respectfully call attention to the next line in that instruction, which would be your Honor's page 22?

The Court: 22. [235]

Mr. Scott: Yes. As I recall from our conference—Your Honor will note that right after what you read in line 22 and line 23 this instruction goes on, “as he did in the instant accident.” Should it not be, “as he claimed that he did,” or “as is claimed that he did”?

The Court: I will insert the words “he claimed,” making it read “as he claimed he did.”

Mr. Scott: Yes. In other words, not making it an assumption of fact.

Mr. Goldstein: Your Honor, may I respectfully ask your Honor to read the balance of that instruction so as to get the continuity from the point where Mr. Scott called your attention to this?

The Court: Yes, I will insert the words “he claimed,” in there, “as he claimed he did.”

The Court: Now, ladies and gentlemen of the jury, we have prepared for your convenience three forms of verdicts, which I shall read to you: After the title of court and cause, “Verdict. We, the jury in the above entitled case, find for the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, and against the defendants Charles Gromer Dickinson and Doris May Dickinson, William Kemp, and L. K. Fereva, individually and doing business under the firm name and style of Fereva Chevrolet Company. Dated December 29, 1941,” and a line for the signature of the foreman.

The other verdict reads, after title of court and cause, “We, the jury in the above entitled action, find in favor of the defendants William Kemp, and L. K. Fereva, individually and doing business under

the firm name and style of Fereva [236] Chevrolet Company. Dated December 29, 1941." And a blank line and underneath that the word "Foreman."

The third verdict prepared for your convenience after the title of court and cause reads as follows: "We, the jury in the above entitled action, find in favor of the defendants Charles Gromer Dickinson and Doris May Dickinson and against the plaintiff General Accident Health and Life Assurance Corporation, Ltd., a corporation, and on the cross-complaint of said defendants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, we find in their favor and against the plaintiff and cross-defendants General Accident Health and Fire Assurance Corporation, Ltd., of Perth, Scotland, a corporation, in the sum of \$5,261.65, with interest thereon at the rate of 7 per cent. per annum from December 7, 1940, until paid. Dated December 29, 1941," and a line for signature under which is "Foreman."

I just read these for your convenience to acquaint you with the nature of them and for no other purpose.

You may retire now and deliberate upon your verdict.

(The jury retired at 2:55 o'clock p. m. to deliberate upon their verdict, and returned into court with their verdict at 4:15 o'clock p. m.)

[Endorsed]: Filed June 26, 1943. [237]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD UPON HEARING OF PROPOSED
AMENDMENTS AND OBJECTIONS TO
PROPOSED FINDINGS AND JUDGMENT.

Before Hon. Martin I. Welsh, Judge.

Counsel:

For Plaintiff Corporation:

J. WALTER SCOTT, ESQ.,
Standard Oil Building,
San Francisco, California.

For Defendant Dickinson:

J. OSCAR GOLDSTEIN, ESQ.,
Chico, California.

Monday, March 2, A. D. 1942

The matter of hearing on proposed amendments to proposed findings and judgment herein, came on regularly on this day, at 2:30 o'clock P.M. The plaintiff corporation was represented by J. Walter Scott, Esq., its counsel, and the defendant Dickinson, with others, was represented by J. Oscar Goldstein, Esq.,

Upon the calling of the matter, the following proceedings were had:

The Court: General Accident vs. Dickson.

Mr. Scott: Ready.

Mr. Goldstein: If your Honor please, on the seventh of January, this year, there was served on

counsel for the plaintiff the proposed findings and judgment—findings of fact and conclusions of law, and the judgment, which are now in the possession of your Honor, and some weeks later, we were served with copies of amendments—so-called proposed amendments and objections to the findings. Thereafter I assume the court took them up in the regular way and this day has been fixed for oral argument or hearing upon questions on the proposed findings, and I desire now formally to ask the court to sign and file the findings which were prepared in behalf of the defendant. In order, perhaps, to save time, I don't know what your Honor has in mind or——

The Court: I have this in mind, Mr. Goldstein: The court is not at all satisfied with the sufficiency of notice extended to the insurance company, I have my doubts about it, that feature of your case, and I would like to hear you in regard to that.

(Argument follows.)

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

C. W. CALBREATH,

Clerk, District Court of the
U. S. Northern District of
California.

By F. M. LAMPERT

Deputy Clerk.

[Endorsed]: Filed Oct. 14, 1943. Paul P. O'Brien, Clerk.

[Endorsed]: No. 10501. United States Circuit Court of Appeals for the Ninth Circuit. Charles Gromer Dickinson and Doris May Dickinson, His Wife; William Kemp; and L. K. Fereva, Individually and doing business under the firm name and style of "Fereva Chevrolet Company", Appellants, vs. General Accident Fire and Life Assurance Corporation, Ltd., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed July 24, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 10501

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., a cor-
poration,

Plaintiff,

vs.

CHARLES GROMER DICKINSON, DORIS
MAY DICKINSON, WILLIAM KEMP and
L. K. FERREVA, individually and doing busi-
ness under the firm name and style of "FER-
REVA CHEVROLET COMPANY",

Defendants.

CHARLES GROMER DICKINSON and DORIS
MAY DICKINSON, husband and wife,

Cross-claimants,

vs.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION., of PERTH,
SCOTLAND, a corporation,

Cross-defendant.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF

(Rule 19)

Come now the appellants on the above entitled

appeal and present their statement of points on appeal, and designate the portions of the record they consider necessary for the consideration thereof, to wit:

I.

That the evidence affirmatively established and is conclusive that the plaintiff is liable under all of the terms and conditions as set forth in the policy of automobile insurance by reason of the accident which occurred on February 25, 1940.

II.

That the evidence was and is undisputed in favor of the defendants and cross-claimants that the insured defendant, L. K. Fereva, doing business as "Fereva Chevrolet Company", duly and fully complied with all the terms, covenants, and conditions of the policy of indemnity insurance set out in plaintiff's complaint marked "Exhibit A", and that said defendants and cross-claimants, Charles Gromer Dickinson and Doris May Dickinson, husband and wife, under condition 9 of said policy of insurance, are entitled to recover the full amount due them under the judgment obtained in the Superior Court of the State of California, in and for the County of Placer.

III.

That it affirmatively appears from the evidence that the insured, L. K. Fereva, doing business as Fereva Chevrolet Company, duly informed the plaintiff and cross-defendant of the accident within ten days after the occurrence of the accident and

that no prejudice of any kind resulted to said plaintiff and cross-defendant company in any respect whatsoever.

IV.

That the evidence on the case as a whole is insufficient as a matter of law to justify the decision and judgement of the court.

V.

That the evidence is conclusive that plaintiff and cross-defendant company was not relieved of liability by the failuer of the insured to comply with Condition 7 of the policy requiring immediate written notice of the accident with said company, because all of the provisions of said condition 7 of the policy of insurance in question were duly waived by said plaintiff and cross-defendant company.

VI.

That it affirmatively appears and the evidence is conclusive that defendant L. K. Fereva gave due notice of the accident within ten (10) days after the 25th day of February, 1940, orally to R. F. Urquhart, district representative of plaintiff and cross-defendant company, which had been set up and considered the general practice, mode and custom of the plaintiff company in giving notice to said company of any accident or loss by said defendant L. K. Fereva for himself and others, thereby waiving the provisions contained in condition 7 of the insurance contract in question, and said plaintiff and cross-defendant was hence estopped

from setting up the provisions of condition 7 as a defense to the rights of defendants and cross-claimants under said contract of indemnity insurance.

VII.

That while it is the established law that the failure of the assured to comply with the condition of the policy, requiring immediate written notice of the accident under certain conditions, relieves the plaintiff company from liability on the judgment, nevertheless in the instant case the evidence is undisputed that the company waived said provisions relative to written notice, and further, that no prejudice resulted to plaintiff company from the failure of the assured to give such immediate written notice as provided by condition 7, and that said assured L. K. Fereva cooperated with plaintiff company in every way to defeat the action filed against him in the lower court by the Dickinsons and fully and completely made a substantial compliance with the terms and conditions of his policy of indemnity insurance.

VIII.

That it affirmatively appears that defendants and cross-claimants were entitled as a matter of law to a jury trial of the issues involved in the action filed by plaintiff and cross-defendant; that the verdict of the jury finding in favor of defendants and cross-claimants and against the plaintiff company was determinative of all issues involved in the action thus filed by plaintiff and cross-defendant;

that said jury found in favor of said Dickinsons and against plaintiff company in the sum of Five Thousand Two Hundred Sixteen Dollars and Sixty-five Cents (\$5,216.65), with interest, and that such judgment in their behalf should have been entered by the Clerk of the Court forthwith, together with judgment in favor of the other defendants as found by the jury's verdict; that the findings and judgment as made and entered by the Court are contrary to the verdict of the jury and have no substantial basis in fact or law.

IX.

That it affirmatively appears that defendant L. K. Fereva was the general agent of the plaintiff company, and that all his actions and conduct relative to giving notice of accidents were fully known, approved, and acquiesced in by plaintiff company in connection with giving notice of loss in any accident in which he had any interest, and hence the plaintiff company was and is bound by his actions and conduct, and at least as to the defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife, the verdict of the jury must be sustained and they are entitled to recover as against said plaintiff and cross-defendant the full amount of their claim due from defendant L. K. Fereva.

X.

The court erred in ignoring and setting aside the verdict of the jury in favor of defendants and

cross-claimants and entering judgment in favor of plaintiff.

Appellants designate the following portions of the record as necessary for the consideration of said points on appeal:

1. Complaint for declaratory relief, etc., omitting and excluding therefrom the exhibits A, B, and C. Omit title of court and cause.

2. Answer and cross claim of defendants, Charles Gromer Dickinson, Doris May Dickinson, and William Kemp. Omit title of court and cause.

3. Answer of defendant, L. K. Fereva, individually and doing business under the firm name and style of "Fereva Chevrolet Company." Omit title of court and cause.

4. Answer of plaintiff to cross claim of defendants, Charles Gromer Dickinson, and Doris May Dickinson. Omit title of cause and cause.

5. Amendment to answer of defendants, Charles Gromer Dickinson and Doris May Dickinson and William Kemp. Omit title of court and cause.

6. Verdict of jury as to defendants, Charles Gromer Dickinson and Doris May Dickinson. Omit title of court and cause.

7. Verdict of jury as to defendant, William Kemp and L. K. Fereva, individually and doing business under the firm name and style of "Fereva Chevrolet Company." Omit title of court and cause.

8. Findings and conclusions of law signed by the court in favor of plaintiff. Omit title of court and cause.

9. Judgment and decree made and entered in favor of plaintiff. Omit title of court and cause.

10. Notice of intention of plaintiff to move for a new trial. Omit title of court and cause.

11. Notice of entry of judgment and decree. Omit title of court and cause.

12. Petition and motion of defendants and cross-claimants for new trial. Omit title of court and cause.

13. Notice of Clerk of denial of motion for new trial. Omit title of court and cause.

14. Notice of appeal and designation of matters to be included in record on appeal. Omit title of court and cause.

15. Order transferring original exhibits and reporter's transcript to clerk of the Circuit Court of Appeals. Omit title of court and cause.

16. Appellants designation of contents of record on appeal. Omit title of court and cause.

17. Cost bond on appeal. Omit title of court and cause.

18. Certificate of clerk of District Court to transcript on appeal. Omit title of court and cause.

All of the foregoing documents refer to the clerk's transcript on appeal as filed with the Clerk of the Circuit Court of Appeals.

19. The following proceedings and testimony taken on the trial of the case commencing December 22, 1941 as follows: All of the proceedings and testimony commencing with line 1 on page 2 of the reporter's transcript and ending with line

7, page 221, excluding the following parts and portions thereof, viz.:

- (a) Omit lines 1 to 8 inclusive, p. 12.
- (b) Omit lines 1, p. 29 to line 12 inclusive, p. 30.
- (c) Omit from line 22, p. 53 to line 6 inclusive on p. 55.
- (d) Omit from line 8, p. 110 to line 15 inclusive, p. 112.
- (e) Omit line 3, p. 131 to line 10 inclusive, p. 131.
- (f) Omit line 7, p. 152 to line 4 inclusive, p. 153.
- (g) Omit line 1, p. 169 to line 8 inclusive, p. 169.
- (h) Omit line 5, p. 173 to line 16 inclusive, p. 173.
- (i) Omit line 1, p. 174 to line 5, p. 174.
- (j) Omit line 11, p. 190 to line 23, p. 190.
- (k) Omit line 5, p. 195 to line 7 inclusive, p. 195.
- (l) Omit line 7, p. 197 to line 17 inclusive, p. 197.
- (m) Omit line 26, p. 202 to line 5 inclusive, p. 203.
- (n) Omit line 30, p. 216 to line 10 inclusive, p. 217.
- (o) From reporter's transcript insert from line 17, page 236 to line 22, page 237.

20. It is not necessary to print any of the exhibits of plaintiff or defendants which were offered in evidence which I referred to in reporter's trans-

cript, as all of the said original exhibits are to be used on consideration of this appeal without reproduction in the record. All of said exhibits have already been transmitted to the clerk of the Circuit Court of Appeals by order of the District Court.

21. Order extending time to file statement of points and designation of record in Circuit Court of Appeals. Omit title of court and cause.

22. Statement of points and designation of record, under Rule 19.

The foregoing statement of points on appeal, and designation of the parts of the record which appellants deem to be necessary for the consideration of said appeal is respectfully presented and filed in compliance with Rule 19, subdivision 6 of the rules of the United States Circuit Court of Appeals.

Dated August 9, 1943.

J. OSCAR GOLDSTEIN and
BURTON J. GOLDSTEIN,
ESQS.,

Chico, California, Attorneys for defendants and cross-claimants Charles Gromer Dickinson and Doris May Dickinson, husband and wife.

MILTON M. HOGLE, ESQ.,

Willows, California, Attorney for L. K. Fereva, individually and dba "Fereva Chevrolet Company", defendant.

ERLING S. NORBY, ESQ.,
Marysville, and
J. OSCAR GOLDSTEIN, ESQ.,
Chico, California, Attorneys for defendant Wil-
liam Kemp.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 10, 1943. Paul P.
O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10501

CHARLES GROMER DICKINSON, et al,
Appellants

vs.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., a cor-
poration

Appellee

NOTICE OF MOTION TO DISPENSE WITH
PRINTING OF EXHIBITS AND THE USE
OF ORIGINAL EXHIBITS BY THE
COURT.

To General Accident Fire and Life Assurance Cor-
poration, Ltd., a Corporation, Appellee

You and Each of You Will Please Take Notice
that the appellants in the above-entitled Court and
Cause will move the above Honorable Court, at its

Courtroom in the Circuit Court of Appeals for the Ninth Circuit, in the Post Office Building, San Francisco, California, on Monday, August 30th, 1943, at the hour of 10:00 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, to grant permission to appellants to dispense with the printing or reproducing of all of the exhibits or portions thereof, which were offered and received in evidence on the trial of the above entitled case in the District Court of the United States, in and for the Northern District of California, and to grant appellants permission to have all of said original exhibits certified to the Court by the Clerk so that they may be used and referred to in the briefs of respective counsel and upon the oral argument of the Cause and for all other purposes.

This motion will be made and based upon the Affidavit of J. Oscar Goldstein, Esq., one of the attorneys for appellants herein, and also upon the pleadings, proceedings, records, and documents now on file in the above-entitled Court and Cause pertaining to the above-entitled action and, if necessary, upon oral evidence to be introduced before the Court upon the hearing of this motion.

Dated: Chico, California, August 10, 1943.

J. OSCAR GOLDSTEIN

J. Oscar Goldstein and Burton J. Goldstein, Esqs.,
Chico, California, Attorneys for Appellants,
Charles Gromer Dickinson and Doris May
Dickinson, husband and wife;

Milton M. Hogle, Esq., Willows, California, attorney for L. K. Fereva, individually and dba "Fereva Chevrolet Company", Appellant;

Erling S. Norby, Esq., Marysville, and J. Oscar Goldstein, Esq., Chico, California, attorneys for Appellant William Kemp.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10501

CHARLES GROMER DICKINSON, et al,
Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD, a cor-
poration

Appellee

AFFIDAVIT OF J. OSCAR GOLDSTEIN TO
DISPENSE WITH PRINTING OF EX-
HIBITS.

State of California
County of Butte—ss.

J. Oscar Goldstein, being first duly sworn, de-
poses and says:

That he is one of the attorneys for appellants
above named; that during the trial of said cause, he
acted as chief counsel for all of the appellants and

is therefore most familiar with the record of the trial and exhibits introduced in the case.

That the trial in the District Court consumed four days and appellants offered in evidence seventeen (17) exhibits and appellees, about six (6); that a number of said exhibits consisted of insurance policies with fine print, and only the small pasters thereon are necessary for consideration on the appeal; that moreover, the most important exhibits, which were necessary for use in the trial and are necessary for consideration in this appeal, were read into the record and will be printed as part of the record according to the request filed by appellants with the Clerk of the Circuit Court of Appeals; that to reproduce all of said exhibits or to print the same as part of the record would involve a needless large cost and expense to appellants, and appellants are in no position financially to bear the burden of such costs; that appellants are in bad financial circumstances and it will be impossible to carry their appeal forward and to present the same to this honorable court if the added burden of reproducing and printing said exhibits be placed upon them.

Affiant further alleges that heretofore by order duly made and entered on July 28, 1943, all of the original exhibits were transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, where they are at present, and all of said original exhibits are available for use by any of the parties to this appeal and by the court upon the final hearing and disposition of the appeal.

That in the interests of justice, it is necessary and advisable that the motion as made be granted and thus afford appellants an opportunity to present the pending appeal to the above honorable court.

J. OSCAR GOLDSTEIN

Subscribed and sworn to before me this 10th day of August, 1943

(Seal)

DUNCAN C. McCALLUM

Notary Public in and for the County of Butte, State of California.

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit
Judge

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 11, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF
THE RECORD THAT APPELLEE THINKS
MATERIAL FOR THE CONSIDERATION
OF POINTS RAISED ON APPEAL HERE-
IN

Comes now General Accident Fire and Life Assurance Corporation, Ltd., a corporation, plaintiff and appellee, and within the time allowed by the rule of Court designates in writing additional parts

of the record which said plaintiff and appellee thinks material and necessary for consideration of the points raised on appeal herein, and requests that the same be printed as a part of the record:

1. Reporter's Transcript, from line 3, page 221, to and including line 15, page 236, embracing the charge to the jury.

2. Plaintiff's exhibit number 1, consisting of policy of insured numbered AG1556, attached to the complaint, as Exhibit "A".

3. Plaintiff's exhibit number 5.

4. Defendants' exhibit "H".

5. "Notice of Filing of Findings of Fact and Conclusions of Law and Judgment", filed January 8, 1942.

6. "Findings of Fact and Conclusions of Law", endorsed "Lodged January 8, 1942".

7. "Judgment and Decree", dated "this day of January, 1942".

8. "Amendments, Objections and Exceptions to Proposed Findings of Fact and Conclusions of Law Heretofore Submitted by Defendants", endorsed filed January 27, 1942.

9. Portion of "Reporter's Transcript of Proceedings Had Upon Hearing of Proposed Amendments and Objections to Proposed Findings and Judgment", on March 2, 1942, commencing at page 1 down to and including line 19 page 3 of said Reporter's Transcript, copy thereof being attached hereto.

With the foregoing exceptions plaintiff and appellee agrees that the exhibits not set out in words

and figures in the Reporter's Transcript as read into the record by counsel for the parties hereto may be omitted from the printed record, and may be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, available for use by any of the parties to the appeal, and by the Court upon final hearing and disposition of the appeal.

This designation is respectfully presented and filed in compliance with Rule 19, Subdivision 6 of the Rules of the United States Circuit Court of Appeals.

Dated: August 19, 1943.

**MYRICK & DEERING AND
SCOTT**

JAMES WALTER SCOTT

Attorneys for Appellee.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 19, 1943. Paul P. O'Brien, Clerk.

No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
ness under the firm name and style of
"Fereva Chevrolet Company",

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF OF APPELLANT FEREVA.

MILTON M. HOGLE,

Willows, California,

Attorney for Appellant Fereva.

FILED

JAN 11 1944

PAUL R. C'BRIEN,

CLERK

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No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
ness under the firm name and style of
“Fereva Chevrolet Company”,

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF OF APPELLANT FEREVA.

STATEMENT OF JURISDICTION.

The complaint in the District Court alleged that plaintiff was a corporation organized and existing under the laws of Scotland and that each of the four defendants was a citizen of the State of California. (T. 2-3.) The suit was of a civil nature (Judicial Code, sec. 274D, 28 USCA, sec. 400) and the sum in controversy was alleged to exceed \$3000 exclusive of interest and costs (T. 2-3). These allegations were admitted by the answers. (T. 14, 22.) The District

Court found them true. (T. 88-89.) Jurisdiction of the District Court is therefore sustained by section 24 of the Judicial Code. (28 USCA, sec. 41.)

The final judgment of the District Court was entered against the defendants on October 9, 1942. (T. 98-101.) Their motion for new trial was served and filed on October 15, 1942 (T. 102-107) and denied on February 23, 1942 (T. 107-108). Their notice of appeal was filed May 21, 1942. (T. 108-109.) Jurisdiction of this court upon appeal to review the said judgment is therefore sustained by the Judicial Code and the Rules of Civil Procedure. (Judicial Code, sec. 128, 28 USCA, sec. 225, Rules of Civil Procedure, Nos. 73 and 75, 28 USCA, following section 723c.)

STATEMENT OF THE CASE.

Plaintiff insurance company invoked the Federal Declaratory Judgment Act (Judicial Code, sec. 274D, 28 USCA, sec. 400) to obtain a declaration of its rights under a policy of automobile liability insurance it had issued to defendant L. K. Fereva on December 6, 1939. (T. 2-13.) Other defendants in the action were Charles and Doris Dickinson and William Kemp who were injured when the automobile covered by the policy was involved in an accident on February 25, 1940. (T. 4-5.) A copy of the policy was annexed to the complaint. (T. 4, 13, 119-140.) One of the terms of the policy required the insurer to pay on behalf of the insured any damages because of bodily injuries sustained by any person caused by accident

arising out of the operation of the automobile. (T. 122-123.) Another term of the policy required the insurer to defend any suit against the insured for such damages. (T. 124.) Other terms of the policy required written notice of an accident to be given to the insurer or any of its authorized agents "as soon as practicable" (T. 131), and entitled any injured person who had secured judgment against the insured "to recover under the terms of the policy in the same manner and to the same extent as the insured." (T. 132.)

The complaint, filed February 7, 1941 (T. 3), alleged the occurrence of the accident on February 25, 1940, and resulting injury therefrom to the defendants Dickinson and defendant Kemp (T. 4-5); failure to give notice thereof to the insurer until April 26, 1940 (T. 5); commencement of an action for damages by defendants Dickinson against the insured on April 12, 1940, and the securing of judgment therein against the insured for \$5000 and costs on December 16, 1940 (T. 5-7); commencement of an action for damages by defendant Kemp against the insured on November 30, 1940, for \$7905 and costs, and the pendency of the action (T. 6-7); and defense of such actions by the insurer under reservation of rights. (T. 9-10.) The complaint further alleged that the "actual controversy" between the parties consisted in the assertion by defendants that plaintiff was obligated under its policy to defend said actions and to pay any judgment secured therein, and the assertion by plaintiff that it was released from all liability and obligations under the policy because the insured failed to give to the

insurer notice of the occurrence of said accident until April 26, 1940. (T. 7-9.) Plaintiff prayed for a declaration of nonliability and an injunction against the assertion of liability by defendants. (T. 12-13.)

A joint answer was filed by defendants Dickinson and defendant Kemp on February 27, 1941. (T. 14-16, 21.) They asserted that plaintiff was liable under its said policy, and upon information and belief alleged that the insured notified the insurer of the occurrence of the accident within 15 days thereafter. (T. 15.) They denied that the insurer defended the action under a reservation of rights. (T. 16.) A cross-claim was also filed by defendants Dickinson. (T. 17-21.) They alleged the securing of the judgment against the insured and the liability of the insurer for the payment thereof under its policy. The separate answer of defendant Fereva paralleled the answer of his co-defendants with the exception that he alleged positively that he notified the insurer of the occurrence of the accident within 15 days thereafter. (T. 22-25.) Plaintiff's answer to the cross-claim was the equivalent of a general denial. (T. 25-26.)

On December 22, 1941, defendants Dickinson and defendant Kemp filed an amendment to their answer and set up an "Affirmative, Separate and Distinct Defense". (T. 28-37.) Upon information and belief they alleged: at the time of the accident the insured, defendant Fereva, was an authorized agent of the insurer (T. 29-31); the practice and custom between the insurer and its said agent was for the agent to give oral notice of an accident (T. 31-32); according to

such practice and custom oral notices were given by said agent to R. F. Urquhart, the District Representative of the insurer at Sacramento, and the insurer was estopped from denying the authority of Urquhart to receive oral notice and estopped from asserting that written notice was not given (T. 32-33); within 15 days after the occurrence of the accident of February 25, 1940, the insured gave oral notice thereof to Urquhart (T. 33-34); said oral notice was given by the insured as authorized agent of the insurer (T. 34-35); the insurer waived the terms of the policy requiring written notice of the occurrence of an accident (T. 35-36); the insurer was estopped as to defendants Dickinson and defendant Kemp from setting up the term of the policy requiring written notice (T. 36).

A jury trial was demanded and a jury was empaneled and sworn to try the cause on December 8, 1941 (T. 115). The jury charge covers 19 pages of the transcript. (T. 400-419.) Three forms of verdict were prepared for the convenience of the jury: First, a general verdict for the plaintiff; second, a general verdict for the defendants Fereva and Kemp; third, a verdict for the defendants Dickinson against the plaintiff insurance company for the amount of the judgment they secured against Fereva together with interest and costs. (T. 418-419.)

The verdicts returned by the jury were in favor of defendants and on the second and third forms mentioned. But the trial court rejected these verdicts. It treated them as purely advisory. (T. 40.) It rejected findings of fact and conclusions of law pro-

posed by defendants in accordance with the verdicts and refused to enter judgment for defendants in accordance with the verdicts. (T. 45-81.) Contrary to the verdicts of the jury, it made findings against defendants on all issues (T. 87-97), ordered entry of judgment for plaintiff (T. 40), and entered judgment for plaintiff (T. 98-101).

Succinctly stated, the questions involved on the appeal by the defendant Fereva and the manner in which they are raised, may be summarized as follows: (1) the denial of his right to jury trial, raised by the rulings of the court rejecting the jury verdict in his favor, treating the verdict as purely advisory, making findings of fact and conclusions of law in favor of plaintiff, ordering entry of judgment for plaintiff, and entering judgment for plaintiff, contrary to the said verdict; (2) the sufficiency of the evidence to support the findings, raised by Rule 52 (a) of the Rules of Civil Procedure; and (3) the sufficiency of the findings to support the conclusions of law, raised by the contents thereof.

SPECIFICATION OF ERRORS.

1. The trial court erred in rejecting the verdict of the jury in favor of defendant Kemp.
2. The trial court erred in rejecting findings of fact and conclusions of law proposed by said defendant in accordance with said jury verdict.

3. The trial court erred in refusing to enter judgment for said defendant in accordance with said verdict.

4. The trial court erred in making findings of fact and conclusions of law contrary to said jury verdict.

5. The trial court erred in ordering entry of judgment contrary to said jury verdict.

6. The trial court erred in entering judgment contrary to said jury verdict.

7. The trial court erred in finding that the plaintiff insurer was released of all obligations and liability under its policy of insurance so far as the accident of February 25, 1940 is concerned by reason of failure of the insured to notify plaintiff that any such accident had occurred until sixty days thereafter, for the following reasons: 1. The evidence established that notice thereof had been given in accordance with law; 2. The evidence established as a matter of law that notice thereof had been given in accordance with the terms of the policy; 3. The evidence established as a matter of law that the insurer had waived the terms of the policy respecting notice; 4. The evidence established as a matter of law that the insurer was estopped from asserting noncompliance with the terms of the policy respecting notice; 5. The evidence failed to establish that the insurer was prejudiced by default, delay, or defect in notice.

8. The trial court erred in finding that the insurer had not waived the terms of the policy respecting notice of the occurrence of the accident, for the reason

that the evidence established such waiver as a matter of law.

9. The trial court erred in finding that the insurer was not estopped from asserting that notice of the occurrence of the accident had not been given in accordance with the terms of the policy, for the reason that the evidence established such estoppel as a matter of law.

10. The trial court erred in its conclusions of law that plaintiff should have judgment and that defendants should take nothing, for the following reasons: 1. There is no finding that notice of the occurrence of the accident of February 25, 1940, was not given to the insurer in accordance with law; 2. There is no finding that the insurer was prejudiced by default, delay, or defect in notice.

ARGUMENT OF CASE.

A. SUMMARY.

The case was one in which the defendant Fereva had the absolute right of trial by jury. He demanded trial by jury and trial by jury was had. The verdict of the jury was in his favor and the implied findings of the jury were therefore in his favor on all issues. But the trial court rejected the verdict on the theory that it was purely advisory. Instead of entering judgment for defendant Fereva in accordance with the verdict, the court made findings contrary thereto and contrary to the findings thereby implied

and ordered and entered judgment for plaintiff. Defendant Fereva was thereby deprived of the right of trial by jury safeguarded by the Seventh Amendment to the Constitution of the United States. Because of the denial of the right of trial by jury the judgment against the defendant Fereva should be reversed.

Even if the case be regarded as one in which the defendant Fereva was not entitled to trial by jury as a matter of right, still the essential findings upon which the judgment rests are not supported by substantial evidence. The findings are to the effect that the insurer is not liable to persons injured in the accident of February 25, 1940, because the insured did not comply with the policy terms requiring him to give written notice of the occurrence of an accident to the insurer "or any of its authorized agents as soon as practicable". In California, however, the giving of notice in such cases is regulated by statute. The statute and not the policy term is therefore controlling. Due notice in accordance with the statute was given. The insured was also an authorized agent of the insurer. If he regarded the accident as a trivial one, notice thereof to the insurer was not necessary. If he failed to give notice to the insurer, then his principal, the insurer, and not those injured in the accident should suffer. A custom and practice existed between the insurer and its said authorized agent whereby he would receive oral notices of the occurrence of accidents and orally communicate them to a District Representative of the insurer at Sac-

ramento. When an oral notice was thus communicated to the insurer under the custom and practice it would then obtain such written notice and information as it desired. There was no time limit within which such authorized agent was to make such communications and there was no time limit within which the insurer would respond. This custom and practice was followed in giving notice of the occurrence of the accident of February 25, 1940. There was a waiver by the insurer of the terms of the policy respecting notice. The insurer was estopped from asserting such terms. The insurer was not prejudiced by default or delay in giving notice. The findings essential to a judgment against the defendant Fereva are, as a matter of law, not supported by substantial evidence.

There was no finding of noncompliance with the California statute governing notice. There was no finding that default or delay in giving notice had prejudiced the insurer. The conclusions of law, therefore, are not supported by the findings.

B. POINTS OF LAW AND FACT.

1. THE DEFENDANT FEReva WAS DENIED THE RIGHT OF TRIAL BY JURY.

This subdivision presents the broad question whether the defendant Fereva was denied the right of trial by jury. It covers Specification of Errors numbered 1 to 6 inclusive. It embraces the matters

designated as points VIII and X in the Statement of Points on Appeal. (T. 426-427.) The above heading has been adopted for convenience in argument. The subheadings adhere to the language of the specification.

(a) Specification of Error No. 1. The trial court erred in rejecting the verdict of the jury in favor of defendant Fereva.

Jury trial was duly demanded and a jury was empaneled and sworn on December 8, 1941, to try the cause (T. 115). Responsive to one of the forms submitted to it by the court (T. 418-419), the jury, on December 29, 1941, returned a verdict finding in favor of defendant Fereva (T. 42). The trial court rejected the verdict. It treated it as purely advisory. (T. 40.) It made findings contrary to the implied findings by the jury and entered judgment contrary to the verdict. No motion for directed verdict had been made by plaintiff (T. 397), and therefore the power of the court under Rule 50 of the Rules of Civil Procedure to reserve legal questions for determination after the submission of a cause to the jury, is not involved.

The question of the right of trial by jury in actions under the Federal Declaratory Judgments Act (Judicial Code, sec. 274D, 28 USCA, sec. 400) was fully considered by this court in *Pacific Indem. Co. v. McDonald*, 107 F. 2d 446. That case is decisive to the effect that all defendants in the present action had the absolute right of trial by jury as safeguarded by the Seventh Amendment to the Constitution of the United States. If the trial judge was dissatisfied with the verdict of the jury, its corrective power was

limited to granting a new trial. (*Walker v. New Mexico & S.P.R.Co.*, 165 US 593, 596, 41 L.Ed. 837, 17 SCt 421, 422.) When the court rejected the verdict of the jury in this action there was a plain infraction of the said Amendment.

- (b) **Specification of Error No. 2.** The trial court erred in rejecting findings of fact and conclusions of law proposed by said defendant in accordance with the jury verdict.

Such findings and conclusions were proposed (T. 45-74) and lodged on January 8, 1942 (T. 74). They were rejected by the court. (T. 421.) This was error, and a deprivation of appellant's right of trial by jury.

- (c) **Specification of Error No. 3.** The trial court erred in refusing to enter judgment for said defendant in accordance with said verdict.

An appropriate judgment was submitted. (T. 74-81.) The trial court refused to enter it. (T. 40.) This was error, and a deprivation of appellant's right of trial by jury.

- (d) **Specification of Error No. 4.** The trial court erred in making findings of fact and conclusions of law contrary to said jury verdict.

Findings of fact and conclusions of law to that effect were made by the court. (T. 87-97.) The error is palpable. The deprivation of appellant's right of trial by jury is manifest.

- (e) **Specification of Error No. 5.** The trial court erred in ordering entry of judgment contrary to said jury verdict.

Jury verdict was returned on December 29, 1941. (T. 42.) No judgment was entered until October 8,

1942. (T. 98-101.) On September 24, 1942, the court ordered that judgment be entered against this defendant. (T. 40.) The jury verdict had been in his favor. This was error. This was deprivation of appellant's right of trial by jury.

(f) Specification of Error No. 6. The trial court erred in entering judgment contrary to said jury verdict.

Deprivation of appellant's right of trial by jury became complete by entry of judgment on October 8, 1942. (T. 98-101.) The jury verdict was in favor of this defendant on all issues. The judgment entered was to the contrary.

2. THE JUDGMENT AGAINST THIS DEFENDANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

This subdivision presents the broad question of the sufficiency of the evidence. It covers Specification of Errors numbered 7 to 9 inclusive. It embraces the matters designated as points I, II, III, IV, V, VI, VII, and IX in the Statement of Points on Appeal. (T. 424-427.) The heading has been adopted for convenience. The subheadings adhere to the language of the specification. The arguments thereunder will become moot if the court is of the opinion that this defendant was denied the right of trial by jury.

- (a) Specification of Error No. 7. The trial court erred in finding that the plaintiff insurer was released of all obligations and liability under its policy of insurance so far as the accident of February 25, 1940 is concerned by reason of failure of the insured to notify plaintiff that any such accident had occurred until sixty days thereafter, for the following reasons: 1. The evidence established that notice thereof had been given in accordance with law; 2. The evidence established as a matter of law that notice thereof had been given in accordance with the terms of the policy; 3. The evidence established as a matter of law that the insurer had waived the terms of the policy respecting notice; 4. The evidence established as a matter of law that the insurer was estopped from asserting noncompliance with the terms of the policy respecting notice; 5. The evidence failed to establish that the insurer was prejudiced by default, delay, or defect in notice.

Finding No. 6 contains the finding above mentioned. (T. 90-91.) The finding that notice was not given until 60 days after the accident was repeated in Findings Nos. 14 and 15. (T. 95-97.)

1. There are certain paramount statutes in California on the question of notice. They read:

Insurance Code, sec. 551. "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a less period shall be valid."

Insurance Code, sec. 553. "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived."

Insurance Code, sec. 554. "Delay in the presentation to an insurer of notice or proof of loss

is waived, if caused by an act of his, or if he omits to make objection promptly and specifically upon that ground.”

These sections, it is obvious, controlled the policy term requiring written notice “as soon as practicable”. They permit oral notice to be given at any time unless the insurer promptly and specifically objects to defect or delay in notice.

The jury verdict implied a finding that the insured gave oral notice to the insurer within 3 to 7 days after the accident and that no objection to the form of notice was made by the insurer. (T. 327-329, 337-340.) The jury verdict, in other words, implied a finding that notice to the insurer had been given in accordance with law.

In April, 1940, the insured delivered the summons and complaint in the Dickinson action to the insurer. No objection was then made upon the ground that notice of the accident was not in writing or upon the ground of delay in presentation of notice. (T. 315-331.) The insured was referred to an agent of the insurer in Sacramento for investigation of the facts of the accident. In the office of this investigator a written notice of accident was prepared and signed on April 26, 1940. (T. 158-159.) The insurer did not then object to the written notice upon the ground of delay. (T. 204.) Three days later the Claims Department of the insurer wrote a letter to the insured stating that the Dickinson action would be defended under a reservation of rights. (T. 166-167.) The insurer did not then deny liability under its policy. Liability

was not denied by the insurer until January 28, 1941. (T. 171-172.) The undisputed evidence therefore confirms the implied finding of the jury that notice to the insurer was given in accordance with law. The finding under discussion is therefore without evidentiary support.

2. The policy terms required written notice of any accident to be given to the insurer or any of its authorized agents as soon as practicable.

But policy terms thus phrased do not require an insured to give notice of every accident, nor do the words "as soon as practicable" necessarily refer to the date of an accident. An insured is not required to give notice of an apparently trivial accident resulting in apparently trivial injury. In such cases, policy terms thus phrased are complied with if notice is given within a reasonable time after the insured becomes aware of the serious aspect of the injury suggestive of a possible claim for damages under the policy. This is the law as approved by this court in *Ohio Casualty Co. v. Rosaia*, 74 F. 2d 522, 533-4. The higher courts in California have not announced the law to the contrary.

As the record has it, the insured regarded the accident as apparently trivial with apparently trivial injury resulting. (T. 204, 328-9.) And as it further appears that he gave written notice of the accident within a reasonable time after the contrary became apparent, it follows that he fully complied with the policy terms respecting notice.

Moreover, the insured in this case was also an authorized agent of the insurer. (T. 184-185.) He was authorized to transact all matters subsequent to the execution of a policy of insurance and arising out of it. (Insurance Code, secs. 31, 35.) He had notice of the accident and full discretion to act. If he regarded the accident as a trivial one of which notice was not necessary until after the Dickinsons served their summons and complaint upon him, then the insurer and not this defendant should suffer. The pertinent maxim is contained in section 3543 of the California Civil Code to the effect that "Where one of two innocent persons must suffer by the acts of a third, he, by whose negligence it happened, must be the sufferer". Therefore, the written notice given by the insured on April 26, 1940, was a full compliance with the policy terms respecting notice.

3. The sections of the Insurance Code of California on waiver have already been quoted. Under quoted section 554 delay in giving notice is waived if caused by an act of the insurer. Waiver under the section is clearly manifested in the present case. It resulted from the action of the insurer in establishing and following a custom and practice whereunder it accepted and acted upon oral notices given by this appellant without question as to form or timeliness. The evidence unmistakably shows that this appellant was the statutory agent of the insurer in a district over which one Urquhart presided as special representative of the insurer. (T. 295.) The evidence also unmistakably shows that stickers which the insurer annexed to policies issued at the instance of this

appellant carried the information that Urquhart was the District Representative of the insurer and that notice of loss was to be given to him. (T. 308-309.) And the evidence further unmistakably shows that when this appellant or other insureds under such policies had an accident it was the custom and practice of this appellant to give oral notice thereof to Urquhart, the latter would then refer the matter to one Henretty, an investigator, and the insured would then act upon oral notice thus given. (T. 315-318, 322-324.) This appellant followed this custom and practice in giving notice of the accident of February 25, 1940. (T. 327-329, 331.)

To repeat, waiver under the said section is therefore clearly manifested in the present case. The California law on the subject is summed up in *Ramirez v. United Firemen's Ins. Co. of Philadelphia*, 46 Cal. App. 451, 454, 189 P. 309, as follows:

“The general rule seems to be, however, that any act or series of acts upon the part of the insurer which tend to create a belief in the mind of the claimant under the policy that notice need not be given, or that proofs of loss will be unnecessary, will operate as a waiver, and release such claimant from a compliance with the provision.”

Waiver under quoted sections 553 and 554 is confirmed by other aspects of the evidence. Urquhart, the special representative, to whom the insurer directed that notice of loss be given, made no objection to oral notice of the accident. On the contrary, he accepted such notice and acted upon it. He referred the matter

to Henretty, an investigator. This was plainly a waiver under said sections. This, moreover, was plainly a waiver under the decision in *Estrada v. Queen Insurance Co.*, 107 Cal. App. 504, where it was said, at page 510:

“By making no objection on account of the absence of notice and preliminary proof, and going on to a matter which was concerned with the payment of the claim, and had no connection with complying with the provision calling for preliminary proof of loss within sixty days, we think the company, through its authorized agent, waived this provision and that the insured had a right to rely upon this manifestation of intention to dispense with the preliminary formalities.”

4. The law of equitable estoppel in California, as declared by the court in *Bank of America v. National F. Corp.*, 45 Cal. App. 2d 320, 328, 114 P. 2d 149, is as follows:

“. . . it must be remembered that the whole office of an equitable estoppel is to protect one from a loss which but for the estoppel he could not escape. The whole vital principle of equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation upon which he acted. Such a change of position involves fraud and falsehood and the law abhors both. The doctrine of estoppel is applied when necessary to prevent the acts of a party from operating as a fraud upon one who has been deliberately led to rely upon them.”

What has been said about waiver, impels a conclusion that the insurer is estopped from asserting non-compliance with the policy terms respecting notice.

5. The court made no finding that the insurer was prejudiced by default, delay, or defect in notice. Under the California law the burden was upon the insurer to prove such prejudice, and in the absence of such proof violation of the policy terms respecting notice was not a valid defense. The California law to that effect is plain. (*Norton v. Central Surety & Ins. Co.*, 9 Cal. App. 2d 598, 601, 51 P. 2d 113.)

That the court erred in making the finding under discussion has therefore been demonstrated.

- (b) **Specification of Error No. 8.** The trial court erred in finding that the insurer had not waived the terms in the policy respecting notice of the occurrence of the accident, for the reason that the evidence established such waiver as a matter of law.

In Finding No. 14 (T. 95-96) the court expressly found that no waiver had occurred. A separate specification of error has therefore been made. The arguments applicable to waiver have already been presented.

- (c) **Specification of Error No. 9.** The trial court erred in finding that the insurer was not estopped from asserting that notice of the occurrence of the accident had not been given in accordance with the terms of the policy, for the reason that the evidence established such estoppel as a matter of law.

In Finding No. 14 (T. 95-96) the court expressly found against estoppel. A separate specification of

error has therefore been made. And the arguments applicable to estoppel have already been presented.

**3. THE CONCLUSIONS OF LAW ARE NOT SUPPORTED
BY THE FINDINGS.**

The above heading has been adopted for convenience in discussing Specification of Error No. 10. It is as follows:

Specification of Error No. 10. The trial court erred in its conclusions of law that plaintiff should have judgment and that defendants should take nothing, for the following reasons:

1. There is no finding that notice of the occurrence of the accident of February 25, 1940, was not given to the insurer in accordance with law; 2. There is no finding that the insurer was prejudiced by default, delay, or defect in notice.

1. It was earlier demonstrated that certain sections of the Insurance Code of California expressed the paramount law. There was no finding that notice was not given in accordance with that paramount law. Appellant therefore submits that the findings as made do not support the said conclusions of law. (T. 92.)

2. There was no finding that the insurer was prejudiced by default, delay, or defect in notice. The necessity of a finding of such character in a case like the present was earlier demonstrated. Again appellant submits that the findings as made do not support the said conclusions of law.

CONCLUSION.

For the several reasons herein stated, it is therefore respectfully submitted that the judgment herein should be reversed.

Dated, Willows, California,
January 7, 1944.

MILTON M. HOGLE,
Attorney for Appellant Fereva.

No. 10,501

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
ness under the firm name and style of
“Fereva Chevrolet Company”,

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF OF APPELLANT KEMP.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
Chico, California,

ERLING S. NORBY,
Marysville, California,

Attorneys for Appellant Kemp.

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PAUL P. O'BRIEN,

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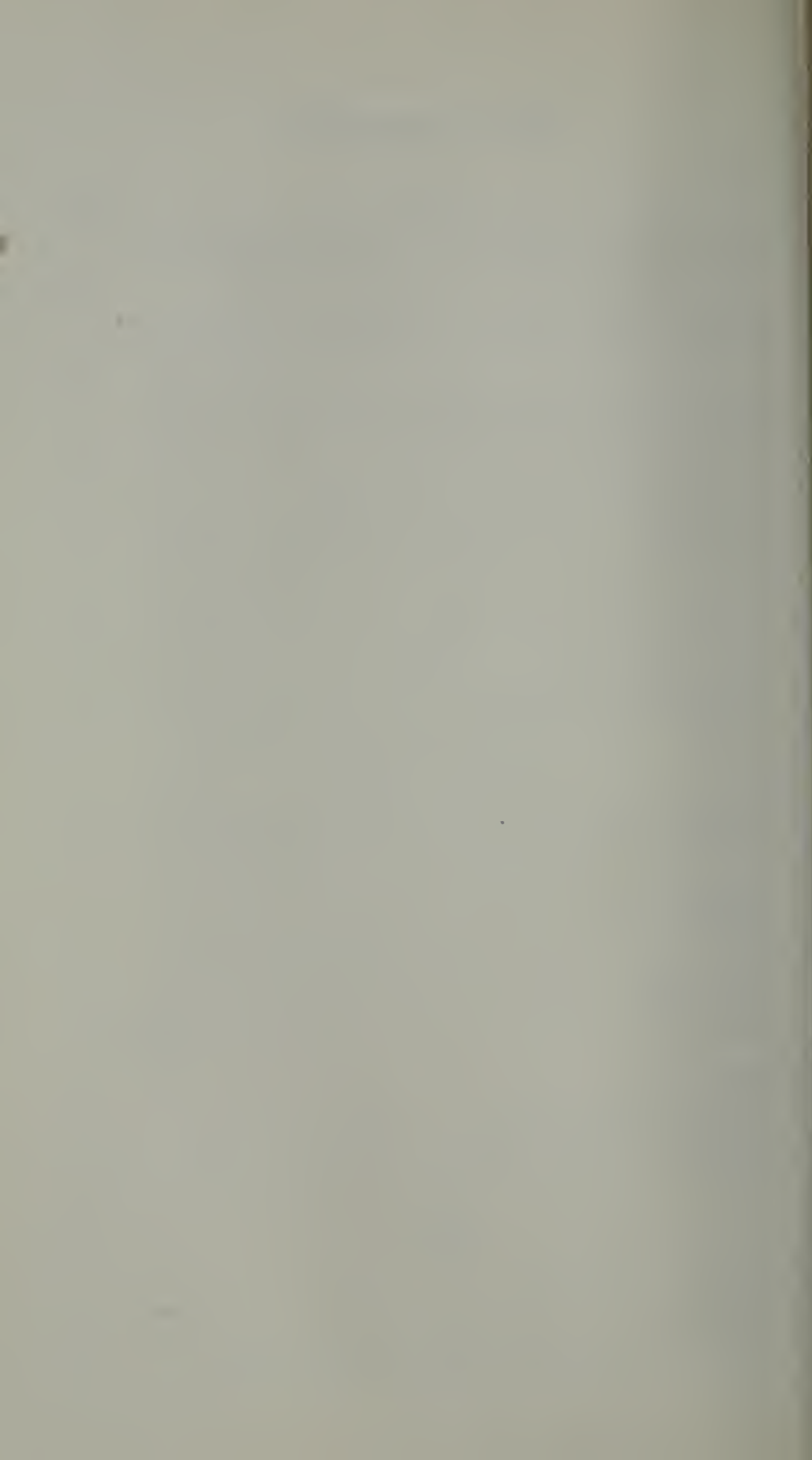
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For the Ninth Circuit

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Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF OF APPELLANT KEMP.

STATEMENT OF JURISDICTION.

The complaint in the District Court alleged that plaintiff was a corporation organized and existing under the laws of Scotland and that each of the four defendants was a citizen of the State of California. (T. 2-3.) The suit was of a civil nature (Judicial Code, sec. 274D, 28 USCA, sec. 400) and the sum in controversy was alleged to exceed \$3000 exclusive of interest and costs (T. 2-3). These allegations were admitted by the answers. (T. 14, 22.) The District

Court found them true. (T. 88-89.) Jurisdiction of the District Court is therefore sustained by section 24 of the Judicial Code. (28 USCA, sec. 41.)

The final judgment of the District Court was entered against the defendants on October 9, 1942. (T. 98-101.) Their motion for new trial was served and filed on October 15, 1942 (T. 102-107) and denied on February 23, 1942 (T. 107-108). Their notice of appeal was filed May 21, 1942. (T. 108-109.) Jurisdiction of this court upon appeal to review the said judgment is therefore sustained by the Judicial Code and the Rules of Civil Procedure. (Judicial Code, sec. 128, 28 USCA, sec. 225, Rules of Civil Procedure, Nos. 73 and 75, 28 USCA, following section 723c.)

STATEMENT OF THE CASE.

Plaintiff insurance company invoked the Federal Declaratory Judgment Act (Judicial Code, sec. 274D, 28 USCA, sec. 400) to obtain a declaration of its rights under a policy of automobile liability insurance it had issued to defendant L. K. Fereva on December 6, 1939. (T. 2-13.) Other defendants in the action were Charles and Doris Dickinson and William Kemp who were injured when the automobile covered by the policy was involved in an accident on February 25, 1940. (T. 4-5.) A copy of the policy was annexed to the complaint. (T. 4, 13, 119-140.) One of the terms of the policy required the insurer to pay on behalf of the insured any damages because of bodily injuries sustained by any person caused by accident

arising out of the operation of the automobile. (T. 122-123.) Another term of the policy required the insurer to defend any suit against the insured for such damages. (T. 124.) Other terms of the policy required written notice of an accident to be given to the insurer or any of its authorized agents "as soon as practicable" (T. 131), and entitled any injured person who had secured judgment against the insured "to recover under the terms of the policy in the same manner and to the same extent as the insured." (T. 132.)

The complaint, filed February 7, 1941 (T. 3), alleged the occurrence of the accident on February 25, 1940, and resulting injury therefrom to the defendants Dickinson and defendant Kemp (T. 4-5); failure to give notice thereof to the insurer until April 26, 1940 (T. 5); commencement of an action for damages by defendants Dickinson against the insured on April 12, 1940, and the securing of judgment therein against the insured for \$5000 and costs on December 16, 1940 (T. 5-7); commencement of an action for damages by defendant Kemp against the insured on November 30, 1940, for \$7905 and costs, and the pendency of the action (T. 6-7); and defense of such actions by the insurer under reservation of rights. (T. 9-10.) The complaint further alleged that the "actual controversy" between the parties consisted in the assertion by defendants that plaintiff was obligated under its policy to defend said actions and to pay any judgment secured therein, and the assertion by plaintiff that it was released from all liability and obligations under the policy because the insured failed to give to the

insurer notice of the occurrence of said accident until April 26, 1940. (T. 7-9.) Plaintiff prayed for a declaration of nonliability and an injunction against the assertion of liability by defendants. (T. 12-13.)

A joint answer was filed by defendants Dickinson and defendant Kemp on February 27, 1941. (T. 14-16, 21.) They asserted that plaintiff was liable under its said policy, and upon information and belief alleged that the insured notified the insurer of the occurrence of the accident within 15 days thereafter. (T. 15.) They denied that the insurer defended the action under a reservation of rights. (T. 16.) A cross-claim was also filed by defendants Dickinson. (T. 17-21.) They alleged the securing of the judgment against the insured and the liability of the insurer for the payment thereof under its policy. The separate answer of defendant Fereva paralleled the answer of his co-defendants with the exception that he alleged positively that he notified the insurer of the occurrence of the accident within 15 days thereafter. (T. 22-25.) Plaintiff's answer to the cross-claim was the equivalent of a general denial. (T. 25-26.)

On December 22, 1941, defendants Dickinson and defendant Kemp filed an amendment to their answer and set up an "Affirmative, Separate and Distinct Defense". (T. 28-37.) Upon information and belief they alleged: at the time of the accident the insured, defendant Fereva, was an authorized agent of the insurer (T. 29-31); the practice and custom between the insurer and its said agent was for the agent to give oral notice of an accident (T. 31-32); according to

such practice and custom oral notices were given by said agent to R. F. Urquhart, the District Representative of the insurer at Sacramento, and the insurer was estopped from denying the authority of Urquhart to receive oral notice and estopped from asserting that written notice was not given (T. 32-33); within 15 days after the occurrence of the accident of February 25, 1940, the insured gave oral notice thereof to Urquhart (T. 33-34); said oral notice was given by the insured as authorized agent of the insurer (T. 34-35); the insurer waived the terms of the policy requiring written notice of the occurrence of an accident (T. 35-36); the insurer was estopped as to defendants Dickinson and defendant Kemp from setting up the term of the policy requiring written notice (T. 36).

A jury trial was demanded and a jury was empaneled and sworn to try the cause on December 8, 1941 (T. 115). The jury charge covers 19 pages of the transcript. (T. 400-419.) Three forms of verdict were prepared for the convenience of the jury: First, a general verdict for the plaintiff; second, a general verdict for the defendants Fereva and Kemp; third, a verdict for the defendants Dickinson against the plaintiff insurance company for the amount of the judgment they secured against Fereva together with interest and costs. (T. 418-419.)

The verdicts returned by the jury were in favor of defendants and on the second and third forms mentioned. But the trial court rejected these verdicts. It treated them as purely advisory. (T. 40.) It rejected findings of fact and conclusions of law pro-

posed by defendants in accordance with the verdicts and refused to enter judgment for defendants in accordance with the verdicts. (T. 45-81.) Contrary to the verdicts of the jury, it made findings against defendants on all issues (T. 87-97), ordered entry of judgment for plaintiff (T. 40), and entered judgment for plaintiff (T. 98-101).

Succinctly stated, the questions involved on the appeal by the defendant Kemp and the manner in which they are raised, may be summarized as follows: (1) the denial of his right to jury trial, raised by the rulings of the court rejecting the jury verdict in his favor, treating the verdict as purely advisory, making findings of fact and conclusions of law in favor of plaintiff, ordering entry of judgment for plaintiff, and entering judgment for plaintiff, contrary to the said verdict; (2) the sufficiency of the evidence to support the findings, raised by Rule 52 (a) of the Rules of Civil Procedure; and (3) the sufficiency of the findings to support the conclusions of law, raised by the contents thereof.

SPECIFICATION OF ERRORS.

1. The trial court erred in rejecting the verdict of the jury in favor of defendant Kemp.
2. The trial court erred in rejecting findings of fact and conclusions of law proposed by said defendant in accordance with said jury verdict.

3. The trial court erred in refusing to enter judgment for said defendant in accordance with said verdict.

4. The trial court erred in making findings of fact and conclusions of law contrary to said jury verdict.

5. The trial court erred in ordering entry of judgment contrary to said jury verdict.

6. The trial court erred in entering judgment contrary to said jury verdict.

7. The trial court erred in finding that the plaintiff insurer was released of all obligations and liability under its policy of insurance so far as the accident of February 25, 1940 is concerned by reason of failure of the insured to notify plaintiff that any such accident had occurred until sixty days thereafter, for the following reasons: 1. The evidence established that notice thereof had been given in accordance with law; 2. The evidence established as a matter of law that notice thereof had been given in accordance with the terms of the policy; 3. The evidence established as a matter of law that the insurer had waived the terms of the policy respecting notice; 4. The evidence established as a matter of law that the insurer was estopped from asserting noncompliance with the terms of the policy respecting notice; 5. The evidence failed to establish that the insurer was prejudiced by default, delay, or defect in notice.

8. The trial court erred in finding that the insurer had not waived the terms of the policy respecting notice of the occurrence of the accident, for the reason

that the evidence established such waiver as a matter of law.

9. The trial court erred in finding that the insurer was not estopped from asserting that notice of the occurrence of the accident had not been given in accordance with the terms of the policy, for the reason that the evidence established such estoppel as a matter of law.

10. The trial court erred in its conclusions of law that plaintiff should have judgment and that defendants should take nothing, for the following reasons: 1. There is no finding that notice of the occurrence of the accident of February 25, 1940, was not given to the insurer in accordance with law; 2. There is no finding that the insurer was prejudiced by default, delay, or defect in notice.

ARGUMENT OF CASE.

A. SUMMARY.

The case was one in which the defendant Kemp had the absolute right of trial by jury. He demanded trial by jury and trial by jury was had. The verdict of the jury was in his favor and the implied findings of the jury were therefore in his favor on all issues. But the trial court rejected the verdict on the theory that it was purely advisory. Instead of entering judgment for defendant Kemp in accordance with the verdict, the court made findings contrary thereto and contrary to the findings thereby implied

and ordered and entered judgment for plaintiff. Defendant Kemp was thereby deprived of the right of trial by jury safeguarded by the Seventh Amendment to the Constitution of the United States. Because of the denial of the right of trial by jury the judgment against the defendant Kemp should be reversed.

Even if the case be regarded as one in which the defendant Kemp was not entitled to trial by jury as a matter of right, still the essential findings upon which the judgment rests are not supported by substantial evidence. The findings are to the effect that the insurer is not liable to persons injured in the accident of February 25, 1940, because the insured did not comply with the policy terms requiring him to give written notice of the occurrence of an accident to the insurer "or any of its authorized agents as soon as practicable". In California, however, the giving of notice in such cases is regulated by statute. The statute and not the policy term is therefore controlling. Due notice in accordance with the statute was given. The insured was also an authorized agent of the insurer. If he regarded the accident as a trivial one, notice thereof to the insurer was not necessary. If he failed to give notice to the insurer, then his principal, the insurer, and not those injured in the accident should suffer. A custom and practice existed between the insurer and its said authorized agent whereby he would receive oral notices of the occurrence of accidents and orally communicate them to a District Representative of the insurer at Sac-

ramento. When an oral notice was thus communicated to the insurer under the custom and practice it would then obtain such written notice and information as it desired. There was no time limit within which such authorized agent was to make such communications and there was no time limit within which the insurer would respond. This custom and practice was followed in giving notice of the occurrence of the accident of February 25, 1940. There was a waiver by the insurer of the terms of the policy respecting notice. The insurer was estopped from asserting such terms. The insurer was not prejudiced by default or delay in giving notice. The findings essential to a judgment against the defendant Kemp are, as a matter of law, not supported by substantial evidence.

There was no finding of noncompliance with the California statute governing notice. There was no finding that default or delay in giving notice had prejudiced the insurer. The conclusions of law, therefore, are not supported by the findings.

B. POINTS OF LAW AND FACT.

1. THE DEFENDANT KEMP WAS DENIED THE RIGHT OF TRIAL BY JURY.

This subdivision presents the broad question whether the defendant Kemp was denied the right of trial by jury. It covers Specification of Errors numbered 1 to 6 inclusive. It embraces the matters

designated as points VIII and X in the Statement of Points on Appeal. (T. 426-427.) The above heading has been adopted for convenience in argument. The subheadings adhere to the language of the specification.

(a) Specification of Error No. 1. The trial court erred in rejecting the verdict of the jury in favor of defendant Kemp.

Jury trial was duly demanded and a jury was empaneled and sworn on December 8, 1941, to try the cause (T. 115). Responsive to one of the forms submitted to it by the court (T. 418-419), the jury, on December 29, 1941, returned a verdict finding in favor of defendant Kemp (T. 42). The trial court rejected the verdict. It treated it as purely advisory. (T. 40.) It made findings contrary to the implied findings by the jury and entered judgment contrary to the verdict. No motion for directed verdict had been made by plaintiff (T. 397), and therefore the power of the court under Rule 50 of the Rules of Civil Procedure to reserve legal questions for determination after the submission of a cause to the jury, is not involved.

The question of the right of trial by jury in actions under the Federal Declaratory Judgments Act (Judicial Code, sec. 274D, 28 USCA, sec. 400) was fully considered by this court in *Pacific Indem. Co. v. McDonald*, 107 F. 2d 446. That case is decisive to the effect that all defendants in the present action had the absolute right of trial by jury as safeguarded by the Seventh Amendment to the Constitution of the United States. If the trial judge was dissatisfied with the verdict of the jury, its corrective power was

limited to granting a new trial. (*Walker v. New Mexico & S.P.R.Co.*, 165 US. 593, 596, 41 L.Ed. 837, 17 SCt 421, 422.) When the court rejected the verdict of the jury in this action there was a plain infraction of the said Amendment.

- (b) **Specification of Error No. 2.** The trial court erred in rejecting findings of fact and conclusions of law proposed by said defendant in accordance with the jury verdict.

Such findings and conclusions were proposed (T. 45-74) and lodged on January 8, 1942 (T. 74). They were rejected by the court. (T. 421.) This was error, and a deprivation of appellant's right of trial by jury.

- (c) **Specification of Error No. 3.** The trial court erred in refusing to enter judgment for said defendant in accordance with said verdict.

An appropriate judgment was submitted. (T. 74-81.) The trial court refused to enter it. (T. 40.) This was error, and a deprivation of appellant's right of trial by jury.

- (d) **Specification of Error No. 4.** The trial court erred in making findings of fact and conclusions of law contrary to said jury verdict.

Findings of fact and conclusions of law to that effect were made by the court. (T. 87-97.) The error is palpable. The deprivation of appellant's right of trial by jury is manifest.

- (e) **Specification of Error No. 5.** The trial court erred in ordering entry of judgment contrary to said jury verdict.

Jury verdict was returned on December 29, 1941. (T. 42.) No judgment was entered until October 8,

1942. (T. 98-101.) On September 24, 1942, the court ordered that judgment be entered against this defendant. (T. 40.) The jury verdict had been in his favor. This was error. This was deprivation of appellant's right of trial by jury.

(f) Specification of Error No. 6. The trial court erred in entering judgment contrary to said jury verdict.

Deprivation of appellant's right of trial by jury became complete by entry of judgment on October 8, 1942. (T. 98-101.) The jury verdict was in favor of this defendant on all issues. The judgment entered was to the contrary.

2. THE JUDGMENT AGAINST THIS DEFENDANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

This subdivision presents the broad question of the sufficiency of the evidence. It covers Specification of Errors numbered 7 to 9 inclusive. It embraces the matters designated as points I, II, III, IV, V, VI, VII, and IX in the Statement of Points on Appeal. (T. 424-427.) The heading has been adopted for convenience. The subheadings adhere to the language of the specification. The arguments thereunder will become moot if the court is of the opinion that this defendant was denied the right of trial by jury.

- (a) **Specification of Error No. 7.** The trial court erred in finding that the plaintiff insurer was released of all obligations and liability under its policy of insurance so far as the accident of February 25, 1940 is concerned by reason of failure of the insured to notify plaintiff that any such accident had occurred until sixty days thereafter, for the following reasons: 1. The evidence established that notice thereof had been given in accordance with law; 2. The evidence established as a matter of law that notice thereof had been given in accordance with the terms of the policy; 3. The evidence established as a matter of law that the insurer had waived the terms of the policy respecting notice; 4. The evidence established as a matter of law that the insurer was estopped from asserting noncompliance with the terms of the policy respecting notice; 5. The evidence failed to establish that the insurer was prejudiced by default, delay, or defect in notice.

Finding No. 6 contains the finding above mentioned. (T. 90-91.) The finding that notice was not given until 60 days after the accident was repeated in Findings Nos. 14 and 15. (T. 95-97.)

1. There are certain paramount statutes in California on the question of notice. They read:

Insurance Code, sec. 551. "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a less period shall be valid."

Insurance Code, sec. 553. "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived."

Insurance Code, sec. 554. "Delay in the presentation to an insurer of notice or proof of loss

is waived, if caused by an act of his, or if he omits to make objection promptly and specifically upon that ground.”

These sections, it is obvious, controlled the policy term requiring written notice “as soon as practicable”. They permit oral notice to be given at any time unless the insurer promptly and specifically objects to defect or delay in notice.

The jury verdict implied a finding that the insured gave oral notice to the insurer within 3 to 7 days after the accident and that no objection to the form of notice was made by the insurer. (T. 327-329, 337-340.) The jury verdict, in other words, implied a finding that notice to the insurer had been given in accordance with law.

In April, 1940, the insured delivered the summons and complaint in the Dickinson action to the insurer. No objection was then made upon the ground that notice of the accident was not in writing or upon the ground of delay in presentation of notice. (T. 315-331.) The insured was referred to an agent of the insurer in Sacramento for investigation of the facts of the accident. In the office of this investigator a written notice of accident was prepared and signed on April 26, 1940. (T. 158-159.) The insurer did not then object to the written notice upon the ground of delay. (T. 204.) Three days later the Claims Department of the insurer wrote a letter to the insured stating that the Dickinson action would be defended under a reservation of rights. (T. 166-167.) The insurer did not then deny liability under its policy. Liability

was not denied by the insurer until January 28, 1941. (T. 171-172.) The undisputed evidence therefore confirms the implied finding of the jury that notice to the insurer was given in accordance with law. The finding under discussion is therefore without evidentiary support.

2. The policy terms required written notice of any accident to be given to the insurer or any of its authorized agents as soon as practicable.

But policy terms thus phrased do not require an insured to give notice of every accident, nor do the words "as soon as practicable" necessarily refer to the date of an accident. An insured is not required to give notice of an apparently trivial accident resulting in apparently trivial injury. In such cases, policy terms thus phrased are complied with if notice is given within a reasonable time after the insured becomes aware of the serious aspect of the injury suggestive of a possible claim for damages under the policy. This is the law as approved by this court in *Ohio Casualty Co. v. Rosaia*, 74 F. 2d 522, 533-4. The higher courts in California have not announced the law to the contrary.

As the record has it, the insured regarded the accident as apparently trivial with apparently trivial injury resulting. (T. 204, 328-9.) And as it further appears that he gave written notice of the accident within a reasonable time after the contrary became apparent, it follows that he fully complied with the policy terms respecting notice.

Moreover, the insured in this case was also an authorized agent of the insurer. (T. 184-185.) He was authorized to transact all matters subsequent to the execution of a policy of insurance and arising out of it. (Insurance Code, secs. 31, 35.) He had notice of the accident and full discretion to act. If he regarded the accident as a trivial one of which notice was not necessary until after the Dickinsons served their summons and complaint upon him, then the insurer and not this defendant should suffer. The pertinent maxim is contained in section 3543 of the California Civil Code to the effect that "Where one of two innocent persons must suffer by the acts of a third, he, by whose negligence it happened, must be the sufferer". Therefore, the written notice given by the insured on April 26, 1940, was a full compliance with the policy terms respecting notice.

3. The sections of the Insurance Code of California on waiver have already been quoted. Under quoted section 554 delay in giving notice is waived if caused by an act of the insurer. Waiver under the section is clearly manifested in the present case. It resulted from the action of the insurer in establishing and following a custom and practice whereunder it accepted and acted upon oral notices given by Fereva without question as to form or timeliness. The evidence unmistakably shows that Fereva was the statutory agent of the insurer in a district over which one Urquhart presided as special representative of the insurer. (T. 295.) The evidence also unmistakably shows that stickers which the insurer annexed to

policies issued at the instance of Fereva carried the information that Urquhart was the District Representative of the insurer and that notice of loss was to be given to him. (T. 308-309.) And the evidence further unmistakably shows that when Fereva or other insureds under such policies had an accident it was the custom and practice of Fereva to give oral notice thereof to Urquhart, the latter would then refer the matter to one Henretty, an investigator, and the insured would then act upon oral notice thus given. (T. 315-318, 322-324.) Fereva followed this custom and practice in giving notice of the accident of February 25, 1940. (T. 327-329, 331.)

To repeat, waiver under the said section is therefore clearly manifested in the present case. The California law on the subject is summed up in *Ramirez v. United Firemen's Ins. Co. of Philadelphia*, 46 Cal. App. 451, 454, 189 P. 309, as follows:

“The general rule seems to be, however, that any act or series of acts upon the part of the insurer which tend to create a belief in the mind of the claimant under the policy that notice need not be given, or that proofs of loss will be unnecessary, will operate as a waiver, and release such claimant from a compliance with the provision.”

Waiver under quoted sections 553 and 554 is confirmed by other aspects of the evidence. Urquhart, the special representative, to whom the insurer directed that notice of loss be given, made no objection to oral notice of the accident. On the contrary, he accepted such notice and acted upon it. He referred the matter

to Henretty, an investigator. This was plainly a waiver under said sections. This, moreover, was plainly a waiver under the decision in *Estrada v. Queen Insurance Co.*, 107 Cal. App. 504, where it was said, at page 510:

“By making no objection on account of the absence of notice and preliminary proof, and going on to a matter which was concerned with the payment of the claim, and had no connection with complying with the provision calling for preliminary proof of loss within sixty days, we think the company, through its authorized agent, waived this provision and that the insured had a right to rely upon this manifestation of intention to dispense with the preliminary formalities.”

4. The law of equitable estoppel in California, as declared by the court in *Bank of America v. National F. Corp.*, 45 Cal. App. 2d 320, 328, 114 P. 2d 149, is as follows:

“. . . it must be remembered that the whole office of an equitable estoppel is to protect one from a loss which but for the estoppel he could not escape. The whole vital principle of equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation upon which he acted. Such a change of position involves fraud and falsehood and the law abhors both. The doctrine of estoppel is applied when necessary to prevent the acts of a party from operating as a fraud upon one who has been deliberately led to rely upon them.”

What has been said about waiver, impels a conclusion that the insurer is estopped from asserting non-compliance with the policy terms respecting notice.

5. The court made no finding that the insurer was prejudiced by default, delay, or defect in notice. Under the California law the burden was upon the insurer to prove such prejudice, and in the absence of such proof violation of the policy terms respecting notice was not a valid defense. The California law to that effect is plain. (*Norton v. Central Surety & Ins. Co.*, 9 Cal. App. 2d 598, 601, 51 P. 2d 113.)

That the court erred in making the finding under discussion has therefore been demonstrated.

(b) Specification of Error No. 8. The trial court erred in finding that the insurer had not waived the terms in the policy respecting notice of the occurrence of the accident, for the reason that the evidence established such waiver as a matter of law.

In Finding No. 14 (T. 95-96) the court expressly found that no waiver had occurred. A separate specification of error has therefore been made. The arguments applicable to waiver have already been presented.

(c) Specification of Error No. 9. The trial court erred in finding that the insurer was not estopped from asserting that notice of the occurrence of the accident had not been given in accordance with the terms of the policy, for the reason that the evidence established such estoppel as a matter of law.

In Finding No. 14 (T. 95-96) the court expressly found against estoppel. A separate specification of

error has therefore been made. And the arguments applicable to estoppel have already been presented.

**3. THE CONCLUSIONS OF LAW ARE NOT SUPPORTED
BY THE FINDINGS.**

The above heading has been adopted for convenience in discussing Specification of Error No. 10. It is as follows:

Specification of Error No. 10. The trial court erred in its conclusions of law that plaintiff should have judgment and that defendants should take nothing, for the following reasons: 1. There is no finding that notice of the occurrence of the accident of February 25, 1940, was not given to the insurer in accordance with law; 2. There is no finding that the insurer was prejudiced by default, delay, or defect in notice.

1. It was earlier demonstrated that certain sections of the Insurance Code of California expressed the paramount law. There was no finding that notice was not given in accordance with that paramount law. Appellant therefore submits that the findings as made do not support the said conclusions of law. (T. 92.)

2. There was no finding that the insurer was prejudiced by default, delay, or defect in notice. The necessity of a finding of such character in a case like the present was earlier demonstrated. Again appellant submits that the findings as made do not support the said conclusions of law.

CONCLUSION.

For the several reasons herein stated, it is therefore respectfully submitted that the judgment herein should be reversed.

Dated, Chico, California,
January 7, 1944.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
ERLING S. NORBY,
Attorneys for Appellant Kemp.

No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FERREVA, individually and doing busi-
ness under the firm name and style of
"Ferreva Chevrolet Company",

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF OF APPELLANT KEMP.

J. OSCAR GOLDSTEIN,

BURTON J. GOLDSTEIN,

Chico, California,

ERLING S. NORBY,

Marysville, California,

Attorneys for Appellant Kemp.

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No. 10,501

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For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FERREVA, individually and doing busi-
ness under the firm name and style of
"Ferrev Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF OF APPELLANT KEMP.

STATEMENT OF JURISDICTION.

The complaint in the District Court alleged that plaintiff was a corporation organized and existing under the laws of Scotland and that each of the four defendants was a citizen of the State of California. (T. 2-3.) The suit was of a civil nature (Judicial Code, sec. 274D, 28 USCA, sec. 400) and the sum in controversy was alleged to exceed \$3000 exclusive of interest and costs (T. 2-3). These allegations were admitted by the answers. (T. 14, 22.) The District

Court found them true. (T. 88-89.) Jurisdiction of the District Court is therefore sustained by section 24 of the Judicial Code. (28 USCA, sec. 41.)

The final judgment of the District Court was entered against the defendants on October 9, 1942. (T. 98-101.) Their motion for new trial was served and filed on October 15, 1942 (T. 102-107) and denied on February 23, 1942 (T. 107-108). Their notice of appeal was filed May 21, 1942. (T. 108-109.) Jurisdiction of this court upon appeal to review the said judgment is therefore sustained by the Judicial Code and the Rules of Civil Procedure. (Judicial Code, sec. 128, 28 USCA, sec. 225, Rules of Civil Procedure, Nos. 73 and 75, 28 USCA, following section 723c.)

STATEMENT OF THE CASE.

Plaintiff insurance company invoked the Federal Declaratory Judgment Act (Judicial Code, sec. 274D, 28 USCA, sec. 400) to obtain a declaration of its rights under a policy of automobile liability insurance it had issued to defendant L. K. Fereva on December 6, 1939. (T. 2-13.) Other defendants in the action were Charles and Doris Dickinson and William Kemp who were injured when the automobile covered by the policy was involved in an accident on February 25, 1940. (T. 4-5.) A copy of the policy was annexed to the complaint. (T. 4, 13, 119-140.) One of the terms of the policy required the insurer to pay on behalf of the insured any damages because of bodily injuries sustained by any person caused by accident

arising out of the operation of the automobile. (T. 122-123.) Another term of the policy required the insurer to defend any suit against the insured for such damages. (T. 124.) Other terms of the policy required written notice of an accident to be given to the insurer or any of its authorized agents "as soon as practicable" (T. 131), and entitled any injured person who had secured judgment against the insured "to recover under the terms of the policy in the same manner and to the same extent as the insured." (T. 132.)

The complaint, filed February 7, 1941 (T. 3), alleged the occurrence of the accident on February 25, 1940, and resulting injury therefrom to the defendants Dickinson and defendant Kemp (T. 4-5); failure to give notice thereof to the insurer until April 26, 1940 (T. 5); commencement of an action for damages by defendants Dickinson against the insured on April 12, 1940, and the securing of judgment therein against the insured for \$5000 and costs on December 16, 1940 (T. 5-7); commencement of an action for damages by defendant Kemp against the insured on November 30, 1940, for \$7905 and costs, and the pendency of the action (T. 6-7); and defense of such actions by the insurer under reservation of rights. (T. 9-10.) The complaint further alleged that the "actual controversy" between the parties consisted in the assertion by defendants that plaintiff was obligated under its policy to defend said actions and to pay any judgment secured therein, and the assertion by plaintiff that it was released from all liability and obligations under the policy because the insured failed to give to the

insurer notice of the occurrence of said accident until April 26, 1940. (T. 7-9.) Plaintiff prayed for a declaration of nonliability and an injunction against the assertion of liability by defendants. (T. 12-13.)

A joint answer was filed by defendants Dickinson and defendant Kemp on February 27, 1941. (T. 14-16, 21.) They asserted that plaintiff was liable under its said policy, and upon information and belief alleged that the insured notified the insurer of the occurrence of the accident within 15 days thereafter. (T. 15.) They denied that the insurer defended the action under a reservation of rights. (T. 16.) A cross-claim was also filed by defendants Dickinson. (T. 17-21.) They alleged the securing of the judgment against the insured and the liability of the insurer for the payment thereof under its policy. The separate answer of defendant Fereva paralleled the answer of his co-defendants with the exception that he alleged positively that he notified the insurer of the occurrence of the accident within 15 days thereafter. (T. 22-25.) Plaintiff's answer to the cross-claim was the equivalent of a general denial. (T. 25-26.)

On December 22, 1941, defendants Dickinson and defendant Kemp filed an amendment to their answer and set up an "Affirmative, Separate and Distinct Defense". (T. 28-37.) Upon information and belief they alleged: at the time of the accident the insured, defendant Fereva, was an authorized agent of the insurer (T. 29-31); the practice and custom between the insurer and its said agent was for the agent to give oral notice of an accident (T. 31-32); according to

such practice and custom oral notices were given by said agent to R. F. Urquhart, the District Representative of the insurer at Sacramento, and the insurer was estopped from denying the authority of Urquhart to receive oral notice and estopped from asserting that written notice was not given (T. 32-33); within 15 days after the occurrence of the accident of February 25, 1940, the insured gave oral notice thereof to Urquhart (T. 33-34); said oral notice was given by the insured as authorized agent of the insurer (T. 34-35); the insurer waived the terms of the policy requiring written notice of the occurrence of an accident (T. 35-36); the insurer was estopped as to defendants Dickinson and defendant Kemp from setting up the term of the policy requiring written notice (T. 36).

A jury trial was demanded and a jury was empaneled and sworn to try the cause on December 8, 1941 (T. 115). The jury charge covers 19 pages of the transcript. (T. 400-419.) Three forms of verdict were prepared for the convenience of the jury: First, a general verdict for the plaintiff; second, a general verdict for the defendants Fereva and Kemp; third, a verdict for the defendants Dickinson against the plaintiff insurance company for the amount of the judgment they secured against Fereva together with interest and costs.^c (T. 418-419.)

The verdicts returned by the jury were in favor of defendants and on the second and third forms mentioned. But the trial court rejected these verdicts. It treated them as purely advisory. (T. 40.) It rejected findings of fact and conclusions of law pro-

posed by defendants in accordance with the verdicts and refused to enter judgment for defendants in accordance with the verdicts. (T. 45-81.) Contrary to the verdicts of the jury, it made findings against defendants on all issues (T. 87-97), ordered entry of judgment for plaintiff (T. 40), and entered judgment for plaintiff (T. 98-101).

Succinctly stated, the questions involved on the appeal by the defendant Kemp and the manner in which they are raised, may be summarized as follows: (1) the denial of his right to jury trial, raised by the rulings of the court rejecting the jury verdict in his favor, treating the verdict as purely advisory, making findings of fact and conclusions of law in favor of plaintiff, ordering entry of judgment for plaintiff, and entering judgment for plaintiff, contrary to the said verdict; (2) the sufficiency of the evidence to support the findings, raised by Rule 52 (a) of the Rules of Civil Procedure; and (3) the sufficiency of the findings to support the conclusions of law, raised by the contents thereof.

SPECIFICATION OF ERRORS.

1. The trial court erred in rejecting the verdict of the jury in favor of defendant Kemp.
2. The trial court erred in rejecting findings of fact and conclusions of law proposed by said defendant in accordance with said jury verdict.

3. The trial court erred in refusing to enter judgment for said defendant in accordance with said verdict.

4. The trial court erred in making findings of fact and conclusions of law contrary to said jury verdict.

5. The trial court erred in ordering entry of judgment contrary to said jury verdict.

6. The trial court erred in entering judgment contrary to said jury verdict.

7. The trial court erred in finding that the plaintiff insurer was released of all obligations and liability under its policy of insurance so far as the accident of February 25, 1940 is concerned by reason of failure of the insured to notify plaintiff that any such accident had occurred until sixty days thereafter, for the following reasons: 1. The evidence established that notice thereof had been given in accordance with law; 2. The evidence established as a matter of law that notice thereof had been given in accordance with the terms of the policy; 3. The evidence established as a matter of law that the insurer had waived the terms of the policy respecting notice; 4. The evidence established as a matter of law that the insurer was estopped from asserting noncompliance with the terms of the policy respecting notice; 5. The evidence failed to establish that the insurer was prejudiced by default, delay, or defect in notice.

8. The trial court erred in finding that the insurer had not waived the terms of the policy respecting notice of the occurrence of the accident, for the reason

that the evidence established such waiver as a matter of law.

9. The trial court erred in finding that the insurer was not estopped from asserting that notice of the occurrence of the accident had not been given in accordance with the terms of the policy, for the reason that the evidence established such estoppel as a matter of law.

10. The trial court erred in its conclusions of law that plaintiff should have judgment and that defendants should take nothing, for the following reasons: 1. There is no finding that notice of the occurrence of the accident of February 25, 1940, was not given to the insurer in accordance with law; 2. There is no finding that the insurer was prejudiced by default, delay, or defect in notice.

ARGUMENT OF CASE.

A. SUMMARY.

The case was one in which the defendant Kemp had the absolute right of trial by jury. He demanded trial by jury and trial by jury was had. The verdict of the jury was in his favor and the implied findings of the jury were therefore in his favor on all issues. But the trial court rejected the verdict on the theory that it was purely advisory. Instead of entering judgment for defendant Kemp in accordance with the verdict, the court made findings contrary thereto and contrary to the findings thereby implied

and ordered and entered judgment for plaintiff. Defendant Kemp was thereby deprived of the right of trial by jury safeguarded by the Seventh Amendment to the Constitution of the United States. Because of the denial of the right of trial by jury the judgment against the defendant Kemp should be reversed.

Even if the case be regarded as one in which the defendant Kemp was not entitled to trial by jury as a matter of right, still the essential findings upon which the judgment rests are not supported by substantial evidence. The findings are to the effect that the insurer is not liable to persons injured in the accident of February 25, 1940, because the insured did not comply with the policy terms requiring him to give written notice of the occurrence of an accident to the insurer "or any of its authorized agents as soon as practicable". In California, however, the giving of notice in such cases is regulated by statute. The statute and not the policy term is therefore controlling. Due notice in accordance with the statute was given. The insured was also an authorized agent of the insurer. If he regarded the accident as a trivial one, notice thereof to the insurer was not necessary. If he failed to give notice to the insurer, then his principal, the insurer, and not those injured in the accident should suffer. A custom and practice existed between the insurer and its said authorized agent whereby he would receive oral notices of the occurrence of accidents and orally communicate them to a District Representative of the insurer at Sac-

ramento. When an oral notice was thus communicated to the insurer under the custom and practice it would then obtain such written notice and information as it desired. There was no time limit within which such authorized agent was to make such communications and there was no time limit within which the insurer would respond. This custom and practice was followed in giving notice of the occurrence of the accident of February 25, 1940. There was a waiver by the insurer of the terms of the policy respecting notice. The insurer was estopped from asserting such terms. The insurer was not prejudiced by default or delay in giving notice. The findings essential to a judgment against the defendant Kemp are, as a matter of law, not supported by substantial evidence.

There was no finding of noncompliance with the California statute governing notice. There was no finding that default or delay in giving notice had prejudiced the insurer. The conclusions of law, therefore, are not supported by the findings.

B. POINTS OF LAW AND FACT.

1. THE DEFENDANT KEMP WAS DENIED THE RIGHT OF TRIAL BY JURY.

This subdivision presents the broad question whether the defendant Kemp was denied the right of trial by jury. It covers Specification of Errors numbered 1 to 6 inclusive. It embraces the matters

designated as points VIII and X in the Statement of Points on Appeal. (T. 426-427.) The above heading has been adopted for convenience in argument. The subheadings adhere to the language of the specification.

(a) Specification of Error No. 1. The trial court erred in rejecting the verdict of the jury in favor of defendant Kemp.

Jury trial was duly demanded and a jury was empaneled and sworn on December 8, 1941, to try the cause (T. 115). Responsive to one of the forms submitted to it by the court (T. 418-419), the jury, on December 29, 1941, returned a verdict finding in favor of defendant Kemp (T. 42). The trial court rejected the verdict. It treated it as purely advisory. (T. 40.) It made findings contrary to the implied findings by the jury and entered judgment contrary to the verdict. No motion for directed verdict had been made by plaintiff (T. 397), and therefore the power of the court under Rule 50 of the Rules of Civil Procedure to reserve legal questions for determination after the submission of a cause to the jury, is not involved.

The question of the right of trial by jury in actions under the Federal Declaratory Judgments Act (Judicial Code, sec. 274D, 28 USCA, sec. 400) was fully considered by this court in *Pacific Indem. Co. v. McDonald*, 107 F. 2d 446. That case is decisive to the effect that all defendants in the present action had the absolute right of trial by jury as safeguarded by the Seventh Amendment to the Constitution of the United States. If the trial judge was dissatisfied with the verdict of the jury, its corrective power was

limited to granting a new trial. (*Walker v. New Mexico & S.P.R.Co.*, 165 US. 593, 596, 41 L.Ed. 837, 17 SCt 421, 422.) When the court rejected the verdict of the jury in this action there was a plain infraction of the said Amendment.

- (b) **Specification of Error No. 2.** The trial court erred in rejecting findings of fact and conclusions of law proposed by said defendant in accordance with the jury verdict.

Such findings and conclusions were proposed (T. 45-74) and lodged on January 8, 1942 (T. 74). They were rejected by the court. (T. 421.) This was error, and a deprivation of appellant's right of trial by jury.

- (c) **Specification of Error No. 3.** The trial court erred in refusing to enter judgment for said defendant in accordance with said verdict.

An appropriate judgment was submitted. (T. 74-81.) The trial court refused to enter it. (T. 40.) This was error, and a deprivation of appellant's right of trial by jury.

- (d) **Specification of Error No. 4.** The trial court erred in making findings of fact and conclusions of law contrary to said jury verdict.

Findings of fact and conclusions of law to that effect were made by the court. (T. 87-97.) The error is palpable. The deprivation of appellant's right of trial by jury is manifest.

- (e) **Specification of Error No. 5.** The trial court erred in ordering entry of judgment contrary to said jury verdict.

Jury verdict was returned on December 29, 1941. (T. 42.) No judgment was entered until October 8,

1942. (T. 98-101.) On September 24, 1942, the court ordered that judgment be entered against this defendant. (T. 40.) The jury verdict had been in his favor. This was error. This was deprivation of appellant's right of trial by jury.

(f) **Specification of Error No. 6.** The trial court erred in entering judgment contrary to said jury verdict.

Deprivation of appellant's right of trial by jury became complete by entry of judgment on October 8, 1942. (T. 98-101.) The jury verdict was in favor of this defendant on all issues. The judgment entered was to the contrary.

2. THE JUDGMENT AGAINST THIS DEFENDANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

This subdivision presents the broad question of the sufficiency of the evidence. It covers Specification of Errors numbered 7 to 9 inclusive. It embraces the matters designated as points I, II, III, IV, V, VI, VII, and IX in the Statement of Points on Appeal. (T. 424-427.) The heading has been adopted for convenience. The subheadings adhere to the language of the specification. The arguments thereunder will become moot if the court is of the opinion that this defendant was denied the right of trial by jury.

- (a) Specification of Error No. 7. The trial court erred in finding that the plaintiff insurer was released of all obligations and liability under its policy of insurance so far as the accident of February 25, 1940 is concerned by reason of failure of the insured to notify plaintiff that any such accident had occurred until sixty days thereafter, for the following reasons: 1. The evidence established that notice thereof had been given in accordance with law; 2. The evidence established as a matter of law that notice thereof had been given in accordance with the terms of the policy; 3. The evidence established as a matter of law that the insurer had waived the terms of the policy respecting notice; 4. The evidence established as a matter of law that the insurer was estopped from asserting noncompliance with the terms of the policy respecting notice; 5. The evidence failed to establish that the insurer was prejudiced by default, delay, or defect in notice.

Finding No. 6 contains the finding above mentioned. (T. 90-91.) The finding that notice was not given until 60 days after the accident was repeated in Findings Nos. 14 and 15. (T. 95-97.)

1. There are certain paramount statutes in California on the question of notice. They read:

Insurance Code, sec. 551. "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a less period shall be valid."

Insurance Code, sec. 553. "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived."

Insurance Code, sec. 554. "Delay in the presentation to an insurer of notice or proof of loss

is waived, if caused by an act of his, or if he omits to make objection promptly and specifically upon that ground."

These sections, it is obvious, controlled the policy term requiring written notice "as soon as practicable". They permit oral notice to be given at any time unless the insurer promptly and specifically objects to defect or delay in notice.

The jury verdict implied a finding that the insured gave oral notice to the insurer within 3 to 7 days after the accident and that no objection to the form of notice was made by the insurer. (T. 327-329, 337-340.) The jury verdict, in other words, implied a finding that notice to the insurer had been given in accordance with law.

In April, 1940, the insured delivered the summons and complaint in the Dickinson action to the insurer. No objection was then made upon the ground that notice of the accident was not in writing or upon the ground of delay in presentation of notice. (T. 315-331.) The insured was referred to an agent of the insurer in Sacramento for investigation of the facts of the accident. In the office of this investigator a written notice of accident was prepared and signed on April 26, 1940. (T. 158-159.) The insurer did not then object to the written notice upon the ground of delay. (T. 204.) Three days later the Claims Department of the insurer wrote a letter to the insured stating that the Dickinson action would be defended under a reservation of rights. (T. 166-167.) The insurer did not then deny liability under its policy. Liability

was not denied by the insurer until January 28, 1941. (T. 171-172.) The undisputed evidence therefore confirms the implied finding of the jury that notice to the insurer was given in accordance with law. The finding under discussion is therefore without evidentiary support.

2. The policy terms required written notice of any accident to be given to the insurer or any of its authorized agents as soon as practicable.

But policy terms thus phrased do not require an insured to give notice of every accident, nor do the words "as soon as practicable" necessarily refer to the date of an accident. An insured is not required to give notice of an apparently trivial accident resulting in apparently trivial injury. In such cases, policy terms thus phrased are complied with if notice is given within a reasonable time after the insured becomes aware of the serious aspect of the injury suggestive of a possible claim for damages under the policy. This is the law as approved by this court in *Ohio Casualty Co. v. Rosaia*, 74 F. 2d 522, 533-4. The higher courts in California have not announced the law to the contrary.

As the record has it, the insured regarded the accident as apparently trivial with apparently trivial injury resulting. (T. 204, 328-9.) And as it further appears that he gave written notice of the accident within a reasonable time after the contrary became apparent, it follows that he fully complied with the policy terms respecting notice.

Moreover, the insured in this case was also an authorized agent of the insurer. (T. 184-185.) He was authorized to transact all matters subsequent to the execution of a policy of insurance and arising out of it. (Insurance Code, secs. 31, 35.) He had notice of the accident and full discretion to act. If he regarded the accident as a trivial one of which notice was not necessary until after the Dickinsons served their summons and complaint upon him, then the insurer and not this defendant should suffer. The pertinent maxim is contained in section 3543 of the California Civil Code to the effect that "Where one of two innocent persons must suffer by the acts of a third, he, by whose negligence it happened, must be the sufferer". Therefore, the written notice given by the insured on April 26, 1940, was a full compliance with the policy terms respecting notice.

3. The sections of the Insurance Code of California on waiver have already been quoted. Under quoted section 554 delay in giving notice is waived if caused by an act of the insurer. Waiver under the section is clearly manifested in the present case. It resulted from the action of the insurer in establishing and following a custom and practice whereunder it accepted and acted upon oral notices given by Fereva without question as to form or timeliness. The evidence unmistakably shows that Fereva was the statutory agent of the insurer in a district over which one Urquhart presided as special representative of the insurer. (T. 295.) The evidence also unmistakably shows that stickers which the insurer annexed to

policies issued at the instance of Fereva carried the information that Urquhart was the District Representative of the insurer and that notice of loss was to be given to him. (T. 308-309.) And the evidence further unmistakably shows that when Fereva or other insureds under such policies had an accident it was the custom and practice of Fereva to give oral notice thereof to Urquhart, the latter would then refer the matter to one Henretty, an investigator, and the insured would then act upon oral notice thus given. (T. 315-318, 322-324.) Fereva followed this custom and practice in giving notice of the accident of February 25, 1940. (T. 327-329, 331.)

To repeat, waiver under the said section is therefore clearly manifested in the present case. The California law on the subject is summed up in *Ramirez v. United Firemen's Ins. Co. of Philadelphia*, 46 Cal. App. 451, 454, 189 P. 309, as follows:

“The general rule seems to be, however, that any act or series of acts upon the part of the insurer which tend to create a belief in the mind of the claimant under the policy that notice need not be given, or that proofs of loss will be unnecessary, will operate as a waiver, and release such claimant from a compliance with the provision.”

Waiver under quoted sections 553 and 554 is confirmed by other aspects of the evidence. Urquhart, the special representative, to whom the insurer directed that notice of loss be given, made no objection to oral notice of the accident. On the contrary, he accepted such notice and acted upon it. He referred the matter

to Henretty, an investigator. This was plainly a waiver under said sections. This, moreover, was plainly a waiver under the decision in *Estrada v. Queen Insurance Co.*, 107 Cal. App. 504, where it was said, at page 510:

“By making no objection on account of the absence of notice and preliminary proof, and going on to a matter which was concerned with the payment of the claim, and had no connection with complying with the provision calling for preliminary proof of loss within sixty days, we think the company, through its authorized agent, waived this provision and that the insured had a right to rely upon this manifestation of intention to dispense with the preliminary formalities.”

4. The law of equitable estoppel in California, as declared by the court in *Bank of America v. National F. Corp.*, 45 Cal. App. 2d 320, 328, 114 P. 2d 149, is as follows:

“ . . . it must be remembered that the whole office of an equitable estoppel is to protect one from a loss which but for the estoppel he could not escape. The whole vital principle of equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation upon which he acted. Such a change of position involves fraud and falsehood and the law abhors both. The doctrine of estoppel is applied when necessary to prevent the acts of a party from operating as a fraud upon one who has been deliberately led to rely upon them.”

What has been said about waiver, impels a conclusion that the insurer is estopped from asserting non-compliance with the policy terms respecting notice.

5. The court made no finding that the insurer was prejudiced by default, delay, or defect in notice. Under the California law the burden was upon the insurer to prove such prejudice, and in the absence of such proof violation of the policy terms respecting notice was not a valid defense. The California law to that effect is plain. (*Norton v. Central Surety & Ins. Co.*, 9 Cal. App. 2d 598, 601, 51 P. 2d 113.)

That the court erred in making the finding under discussion has therefore been demonstrated.

(b) Specification of Error No. 8. The trial court erred in finding that the insurer had not waived the terms in the policy respecting notice of the occurrence of the accident, for the reason that the evidence established such waiver as a matter of law.

In Finding No. 14 (T. 95-96) the court expressly found that no waiver had occurred. A separate specification of error has therefore been made. The arguments applicable to waiver have already been presented.

(c) Specification of Error No. 9. The trial court erred in finding that the insurer was not estopped from asserting that notice of the occurrence of the accident had not been given in accordance with the terms of the policy, for the reason that the evidence established such estoppel as a matter of law.

In Finding No. 14 (T. 95-96) the court expressly found against estoppel. A separate specification of

error has therefore been made. And the arguments applicable to estoppel have already been presented.

**3. THE CONCLUSIONS OF LAW ARE NOT SUPPORTED
BY THE FINDINGS.**

The above heading has been adopted for convenience in discussing Specification of Error No. 10. It is as follows:

Specification of Error No. 10. The trial court erred in its conclusions of law that plaintiff should have judgment and that defendants should take nothing, for the following reasons: 1. There is no finding that notice of the occurrence of the accident of February 25, 1940, was not given to the insurer in accordance with law; 2. There is no finding that the insurer was prejudiced by default, delay, or defect in notice.

1. It was earlier demonstrated that certain sections of the Insurance Code of California expressed the paramount law. There was no finding that notice was not given in accordance with that paramount law. Appellant therefore submits that the findings as made do not support the said conclusions of law. (T. 92.)

2. There was no finding that the insurer was prejudiced by default, delay, or defect in notice. The necessity of a finding of such character in a case like the present was earlier demonstrated. Again appellant submits that the findings as made do not support the said conclusions of law.

CONCLUSION.

For the several reasons herein stated, it is therefore respectfully submitted that the judgment herein should be reversed.

Dated, Chico, California,
January 7, 1944.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
ERLING S. NORBY,
Attorneys for Appellant Kemp.

No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
ness under the firm name and style of
"Fereva Chevrolet Company",

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF FOR APPELLEE.

MYRICK & DEERING AND SCOTT,

JAMES WALTER SCOTT,

Standard Oil Building, San Francisco,

Attorneys for Appellee.

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No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
ness under the firm name and style of
"Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

BRIEF FOR APPELLEE.

Three separate briefs have been filed by appellants herein and the points made are substantially the same in them all. We file this reply brief in answer to the three.

Summarizing appellants' points they seem to be two in number, first, that appellants were improperly deprived of a jury trial; second, that the evidence does not support the findings made by the court.

**THIS CAUSE IS WITHIN EQUITY JURISDICTION AND COURT
PROPERLY HELD VERDICTS ADVISORY.**

Our position with respect to the first point is that this was a suit in equity in which the verdict of the jury was purely advisory. Plaintiff's complaint was filed on the equity side of the court. It sought a declaration of its rights and duties under the policy, also the avoidance of a multiplicity of actions and the obtaining of an injunction against defendants. The actions which concerned plaintiff were five in number: (1) The action of Dickinson against Fereva in which judgment had been rendered in the state court; (2) The defense in the state court of the action of Kemp against Fereva. In each of these the question of the duty of the insurer to defend was involved. There were also a threatened action by Mr. and Mrs. Dickinson against plaintiff upon its policy; another by Kemp in the event he recovered a verdict in the state court, also against the insurer on its policy; and the last one an action by Fereva on the policy to recover his legal expense, attorney's fees, and such sums as he might pay in partial or entire satisfaction of the judgments. In each of these problems the sole point at issue was whether or not Fereva gave timely notice of the happening of the accident as required by condition 7 of the policy.

Answer was filed by the defendants Dickinson and Kemp, consisting of denials and a claim that the plaintiff was estopped by having defended the Dickinson action without reservation of its rights and a cross-claim was filed seeking affirmative relief.

These were the issues involved when the taking of evidence began on December 22, 1941. At that time further equitable issues were presented by the filing of amendment to answer by the Dickinsons and Kemp and seeking affirmative relief, setting out that the plaintiff was estopped from claiming the benefit of condition 7 of its policy and from setting up the same as a defense. ✓

Upon the trial of the case Fereva testified that he gave no written notice of the happening of the accident until the 26th of April, 1940, 60 days after its occurrence. He also testified that he had received notice of reservation of rights from the plaintiff by registered mail in both the Dickinson and Kemp cases.

From that point on the time of the court was consumed by efforts to show ~~estoppel~~ on the part of the plaintiff. The jury returned its verdicts in favor of the defendants.

Thereupon on motion of Mr. Goldstein, representing the defendants and cross-claimants, it was ordered that findings of fact and conclusions of law and judgment be prepared by Mr. Goldstein, with leave to plaintiff to file amendments, same to be thereafter settled by the court. Thereafter Mr. Goldstein submitted to the court proposed findings, moving that the same be signed and filed. (Tr. 43, 420-21.) These proposed findings and a proposed judgment and decree are found at transcript pages 45 and 74. Defendants sought the adoption of the verdicts by the judge.

This conduct on the part of the defendants created as we contend an equitable estoppel as a result of which the defendants who took this position with regard to procedure, which was acted and relied upon by the court, are estopped from taking an inconsistent position.

31 *C. J. S.*, Title "Estoppel", p. 380, Sec. 118.

The court held the verdicts to be purely advisory, and that they should not be adopted (Tr. 40), and signed findings and judgment in favor of the plaintiff and cross-defendant, refusing to adopt the verdicts. (Tr. 87 and 98.)

Up to that time and until the court rendered its decision in favor of the plaintiff and cross-defendant, and signed findings and judgment in its favor, the whole case was treated as a suit in equity. (See recognition of legal and equitable issues at transcript page 398.)

Nowhere at any time between the filing of the original complaint and the signing of the findings, was any question raised as to the nature of this suit as one in equity, as to whether it was a proper cause for an injunction, or as to whether it was properly brought to avoid multiplicity of actions. None of the parties at any time asked the court to separate the legal and equitable issues, to try the equitable before the legal, or to try some to the court and others to the jury. The question of constitutional right to a jury trial was not even suggested by defendants and cross-claimants until their petition and motion for new trial, which appears at transcript page 102.

It being entirely discretionary with the court to grant a new trial, a refusal to grant cannot be assigned as error and is not reviewable unless an abuse of discretion is apparent.

Here the ruling on motion for new trial is not presented for review in defendants' and cross-claimants' "Statement of Points on Appeal". (Tr. 423.)

The court having disposed of the equitable issues in favor of the plaintiff, and having found that the plaintiff was not estopped to defend because of want of notice required by condition 7 of the policy, either by having waived the same or by having undertaken the defense without reservation of rights, there was no issue left to be submitted to a jury as Fereva conceded that he gave no written notice prior to 60 days after the happening, and that the steps taken by plaintiff insurance carrier were all under full reservation of its rights. No evidence to the contrary was offered in the entire record.

Fairmont Glass Works v. Cub Forks Coal Co.,
287 U. S. 474, 77 Law Ed. 439;

Holmgren v. U. S., 217 U. S. 509, 521, 54 Law.
Ed. 861, 19 Anno. Cases 778;

Latchtimaker v. Jacksonville Towing & Wrecking Co., 181 Fed. 277.

The right of trial by jury of legal issues in an action attaches only if such issues remain after trial of the equitable issues.

Fitzpatrick v. Sun Life Assur. of Canada, 1
F. R. D. 713, 717.

A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction calls for adjudication on purely legal rights, and confers purely legal relief. The formula has been stated as follows:

“An adequate remedy at law does not exist where a multiplicity of actions are required to obtain complete relief.”

Oelrichs v. Spain (Oelrichs v. Williams), 15

Wall. 211, 227, 21 L. Ed. 43, 44;

Wyman v. Bowman, 127 Fed. 257;

Camp v. Boyd, 229 U. S. 530, 552, 57 L. Ed.

1317, 1327, 33 S. Ct. 785;

McGowan v. Parish, 237 U. S. 285, 291, 59 L.

Ed. 955, 961, 35 S. Ct. 543;

Graves v. Texas Co., 298 U. S. 393, 80 L. Ed.

1236, 56 S. Ct. 818, and cases cited.

When equity has rightfully obtained jurisdiction, it will grant complete relief even though incidentally there may be an aspect of the case which, taken alone, might be of a legal character rather than equitable. In such instance equity may grant complete relief without violating the Seventh Amendment with respect to jury trial. Under such circumstances the whole case becomes one of equitable cognizance without a right of trial by jury.

Liberty Oil Co. v. Condon, 260 U. S. 235, 244,

67 L. Ed. 232, 236, 43 S. Ct. 118.

New civil procedure rules 38 and 39 do not affect the ancient rule of equity jurisprudence but merely preserve the right to trial by jury as it formerly

existed and do not extend that right if the jury was not formerly required.

An injunction is proper in a suit to obtain declaratory relief and avoid multiplicity of actions.

First State Bank v. Chicago R. I. & P. R. Co.,
63 Fed. (2d) 585, 90 A. L. R. 544;

Standard Accident Ins. Co. v. Grimmer (D.C. La.), 32 Fed. Supp. 81;

Standard Accident Ins. Co. v. Alexander (D.C. Tex.), 23 Fed. Supp. 807;

American Life Ins. Co. v. Stewart, 300 U. S. 203, 81 Law Ed. 605, 111 A. L. R. 1268;

New York Life Ins. Co. v. Truesdale, 79 Fed. (2d) 481;

Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 80 Law. Ed. 920, at pp. 924-5;

Maryland Casualty Co. v. Tighe, 24 Fed. Supp. 49, 29 Fed. Supp. 69;

Continental Casualty Co. v. National Household Distributors, 32 Fed. Supp. 849;

Central Surety & Ins. Co. v. Caswell (C.C.A. 5), 91 Fed. (2d) 607.

Where an equitable defense is interposed the equitable issue should first be disposed of as in a court of equity.

Smith Engineering Co. v. Pray, 61 Fed. (2d) 687.

As the court says in

Rust Engineering Co. v. Lehigh Structural Steel Co., 79 Fed. (2d) 830, at p. 831:

“Our conclusion is that appellant, in filing its equitable defense and thus invoking the powers of a court of equity and then presenting evidence in support of its legal defense on the trial, has waived its constitutional right to a trial of the legal issue by a jury. When, without objection, it proceeded to a trial of the entire issue before the court, it waived the right to demand a jury trial. See *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306; *Reynes v. Dumont*, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934; *Smith Co. v. Pray* (C.C.A.), 61 F. (2d) 687; *General Felt Products, Inc. v. Saranac Co.* (C.C. A), 61 F. (2d) 857.”

A case that presents some points of similarity to the one at bar is

Hargrove v. American Cent. Ins. Co., 125 Fed. (2d) 225,

from which we quote at page 228;

“If the issues tendered are purely equitable, the court has the indisputable right under the civil rules of procedure to call a jury in an advisory capacity of its own initiative and to submit to them such issues of fact as he sees fit, and to accept or disregard its verdict thereon in his discretion. Or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. Rule 39 (c).

“If the issues tendered by the pleadings are purely legal, the parties are entitled to a jury as of right, rule 38 (a), when demanded as provided in rule 38 (b) (c). If no demand is made as provided for in subdivisions (b) and (c), the parties are deemed to have waived the right of trial by

jury, but the court may in its discretion, upon motion of either party, order a jury trial of any or all issues, notwithstanding waiver under 38 (b) (c), but may not order trial by jury on its own initiative. 3 Moore Federal Practice, 3030, sec. 39.03."

And at page 229:

"But the insured had only the right to insist that the cause be submitted to and tried by the court, without the advice of a jury, and that is exactly what he received. The court wholly disregarded the verdict of the jury, made its independent findings and conclusions on which its judgment is based. The verdict of the jury is no part of his judgment. The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain. See (American) Lumbermen's Mutual Casualty Co. of Illinois v. Timms & Howard, Inc., supra."

In

(American) Lumbermen's Mutual Cas. Co. v. Timms & Howard, 108 Fed. (2d) 497,

it appears that the trial procedure was somewhat irregular, or odd as the opinion expresses it. There were legal and equitable issues framed by the pleadings, but the equitable ones presented by the defendant were not tried. However, it was held that the parties with the approval of the judge could agree that an advisory verdict be taken as in equity, and with the same weight that such a verdict had in equity, and that the court had discretion to set aside such verdict, which discretion was not reviewable.

Equitable defenses interposed by answer, plea or replication are to be tried by the judge as a chancellor, and if the equitable issue having been disposed of there remains an issue at law it may be tried by a jury.

Enelow v. New York Life Ins. Co., 293 U. S. 379, 79 Law Ed. 440;

Liberty Oil Co. v. Condon Bank, 260 U. S. 235, 67 Law Ed. 232;

American Mills Co. v. American Surety Co., 260 U.S. 360, 67 Law Ed. 306;

Kneberg v. H. L. Green Co., 89 Fed. (2d) 100.

Recourse to equity by the plaintiff was justified in this case by the decision in

American Life Ins. Co. v. Stewart, 300 U. S. 203, 81 Law Ed. 605, 111 A. L. R. 1268.

**EVIDENCE IS SUFFICIENT TO JUSTIFY
FINDINGS AND JUDGMENT.**

The position taken by appellants other than Fereva that since they are strangers to the contract, since they have sustained injuries and suffered loss through Fereva's conduct they should have the right to recover on the policy of insurance irrespective of any question as to whether Fereva gave timely notice of the happening of the accident, is clearly untenable. The law is thoroughly settled that the right conferred by statute upon an injured person who has secured judgment against the insured to bring an action against an insurance company on its policy is "sub-

ject to its terms and limitations''; that the effect of this statute is to give to an injured claimant a cause of action against an insurer for the same relief that would be due to a solvent insured seeking indemnity and reimbursement after judgment had been satisfied by him. The cause of action is no less, but also it is no greater; insured and claimant must abide by the conditions of the insurance contract. It necessarily follows that if Fereva failed to give written notice as required by condition 7 of the policy of insurance, and forfeited his right to claim indemnity under the policy, the appellants who are cross-complainants likewise lost any right they might otherwise have had under the policy, as Mr. and Mrs. Dickinson and Mr. Kemp stand in no better position than the insured Fereva.

California Statutes 1919, page 776, embodied in California Insurance Code 11580.

An injured person's right of action against an insurer under an automobile policy is dependent upon the provisions of the insurance contract as a whole, and he can acquire no greater right thereunder than that existing in favor of the insured.

Fireman's Fund Indemnity Co. v. Kennedy,
(C.C.A. 9), 97 Fed. (2d) 882.

**IN CALIFORNIA NOTICE OF ACCIDENT MUST BE GIVEN
WITHIN 20 DAYS.**

Immediate notice of the accident is a condition precedent to recovery upon the insurance policy. In

Fireman's Fund Indemnity Co. v. Kennedy,
supra,

it is held that a delay in giving notice of the accident from December 8, 1933, to February 5, 1934, that is for a period of 59 days, constitutes a violation of the terms of the policy and released the insurer. See also

Royal Indemnity Co. v. Morris (C.C.A. 9), 37
Fed. 90, at p. 92;

Purefoy v. Pacific Auto Indemnity Exchange
(1935), 5 Cal. (2d) 81, 53 Pac. (2d) 155.

The matter of time within which notice should be given is regulated by statute in the State of California in

Section 551, Insurance Code of the State of
California,

wherein it is provided as follows:

“Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid.”

If, therefore, 60 days elapsed after the happening of the accident, and before the giving of notice to the company by Mr. Fereva, such delay constituted a breach of the contract prejudicial to the insurer as a matter of law, and the failure to comply with this term of the insurance policy constitutes a complete defense to any action based thereon against the

insurer whether brought by the insured Fereva or by the injured persons.

Distributors Packing Company v. Pacific Indemnity Company (1937), 21 Cal. App. (2d) 505, 70 Pac. (2d) 253;

Coolidge v. Standard Accident Insurance Company (1931), 114 Cal. App. 716, 300 Pac. 885; Insurance Code, Section 551, formerly Civil Code Section 2633-A.

That the provision of the policy requiring immediate notice is a valid provision and substantial compliance with it was a condition precedent to the right to recover under it, see

Clements v. Preferred Accident Insurance Co. of New York (C.C.A. 8), 41 Fed. (2d) 470; *St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co.* (C.C.A. 8), 40 Fed. (2d) 344.

Identical in principle is the case of

Royal Indemnity Co. v. Morris (C.C.A. 9), 37 Fed. (2d) 90,

and also

Metropolitan Casualty Ins. Co. v. Colthurst (C.C.A. 9), 36 Fed. (2d) 559.

A delay of 72 days was fatal to recovery in

Travelers Insurance Co. v. Nax (C.C.A. 3), 142 Fed. 653.

For further illustrative cases see

New Jersey Fidelity & Plate Glass Ins. Co. v. Love (C.C.A. 4), 43 Fed. (2d) 82;

Sawyer v. Travelers Ins. Co. (D.C.Va.), 10 Fed. Supp. 848.

That a reasonable time is deemed to be *within 20 days* from the happening of the accident, see

Coolidge v. Standard Accident Insurance Co.,
114 Cal. App. 716, 300 Pac. 885.

In the following authorities, involving no more delay than the 60 days intervening in the instant case, there was held to be a breach of the condition *as a matter of law*. It will be observed that in all the cases now cited, either the trial court directed a verdict in favor of the defense, with the ruling sustained on appeal, or judgment in favor of the plaintiff was reversed, with the direction to enter judgment in favor of the defendant insurance company. There can thus be no doubt that each of the delays specified was adjudicated a fatal one *as a matter of law*. In connection with each citation, we point out the time involved:

Lewis v. Commercial Casualty Ins. Co. (Md. 1923), 142 Md. 472, 121 Atl. 259 (42 to 45 days);

Hagstrom v. American Fidelity Co. (Minn. 1917), 137 Minn. 39, 163 N.W. 670 (52 days);

Smith & Dove Mfg. Co. v. Travelers Ins. Co. (Mass. 1898), 171 Mass. 357, 50 N. E. 516 (27 days);

Rooney v. Maryland Casualty Co. (Mass. 1903), 184 Mass. 26, 67 N. E. 882 (22 days);

McCarthy v. Rendle (Mass. 1918), 230 Mass. 35, 119 N. E. 188 (15 days);

Haas Tobacco Co. v. American Fidelity Co. (N.Y. 1919), 226 N. Y. 343, 123 N. E. 755 (10 days);

Gullo v. Commercial Casualty Ins. Co. (1929),
235 N. Y. Supp. 584 (13 days) (The question
of waiver, only, was held open for the jury,
at a further trial);

*Commercial Casualty Ins. Co. v. Fruin-Colnon
Cont. Co.* (C.C.A. 8, 1929), 32 Fed. (2d) 425,
429 (53 days);

Rushing v. Commercial Casualty Ins. Co. (N.Y.
1929), 251 N. Y. 302, 167 N. E. 450 (22
days);

Cal. Civil Code, Sec. 2633-2, now embodied in
Cal. Ins. Code, Sec. 551.

TWOFOLD OBLIGATION RESTED ON FEReva AS AGENT AND INSURED.

In analyzing the duty of Fereva as an insured under the policy we respectfully suggest that the fact that Fereva occupied a dual position should be borne in mind at all times. In the first place Fereva was an agent of the plaintiff corporation. As such in dealing with third persons on behalf of the principal and in matters within the scope of his authority *what he did and what he learned as such agent* might be imputable to his principal. Fereva himself testified that he was merely a soliciting agent; that he did not issue or sign policies and had no authority to do so. (Tr. 151, 154-155.)

However, as Mr. Wentz testified the Insurance Department used but one form of license. (Tr. 237-8.) The license itself is in evidence. (Tr. 152-154.) And

our courts have held that so far as the public *with whom he was dealing as agent* was concerned one acting under that form of license should be considered a general agent of the company in making contracts of insurance on its behalf.

Bankers Indemnity Ins. Co. v. Pinkerton (C.C. A. 9), 89 Fed. (2d) 194, 198.

This rule is modified and a distinction drawn between the apparent authority of such an agent and the actual authority. Or in other words the question presented concerns the true relationship existing between the principal and agent. See

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 60 Law Ed. 1202.

However, this case does not involve any question of consummating a contract with the Dickinsons, Kemp or any other person.

This case does involve in part the general duty of Fereva as an agent of the company to communicate to his principal information received by him relating to the business of his principal. It is elemental that honor and good faith called upon him to advise his principal of matters coming to his attention which affect the principal. See

2 *Corpus Juris*, "Agency", p. 714, Sec. 369;
Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

Going a step further in the analysis it is the rule that the knowledge of an agent is not imputed to the principal where the agent is engaged in a transaction in which his interests are adverse to those of the prin-

cipal. To quote the language of the late Judge Bourquin in

Fulkerson v. National Union Fire Ins. Co., 291 Fed. 784, at 787,

wherein the agent was at the same time an insured.

“It is unnecessary to more than recall that in contracts between principal and agent, the notice, knowledge, and possession solely of either is not imputed to the other.

“The virtue of this settled law is strikingly illustrated by the instant case. If the uncommunicated application is effective as a contract, it could be the instrument of fraud—to be communicated if hail and damage rendered profitable; to be withheld if not. And in like circumstances to be falsified in date and to incite to perjury.”

A principal is not charged with knowledge of his agent where the agent deals for himself with the principal, as is the case here where an insured under the policy is at the same time an agent of the company.

Dull v. Royal Ins. Co., 159 Mich. 675, 124 N. W. 533.

This is true in agency generally.

Harrison State Bank v. United States Fidelity & Guaranty Co. (Mont.), 22 Pac. (2d) 1061, 1064;

3 *Corpus Juris Secundum*, Sec. 269, pp. 202-3;
Bombace v. American Bauxite Co. (C.C.A. Pa.), 39 Fed. (2d) 867;

Ohio Millers' Mutual Ins. Co. v. Artesia State Bank (C.C.A. Miss.), 39 Fed. (2d) 400;

In re L. Van Bokkelen, Inc., 7 Fed. Supp. 639, affirming *Royal Baking Powder Co. v. Hussey*, 76 Fed. (2d) 645, certiorari denied *Lowendahl v. Hussey*, 56 S. Ct. 110;
Kean v. National City Bank (C.C.A. Tenn.), 294 Fed. 214, petition dismissed 44 S.Ct. 179, 263 U.S. 729, 68 L.Ed. 528;
Pine Mountain Iron etc., Co. v. Bailey (Minn.), 94 Fed. 258, 36 C.C.A. 229;
Witty v. Clinch, 279 Pac. 797, 207 Cal. 779; Id. 279 Pac. 799, 207 Cal. 798;
Herdan v. Hanson, 189 Pac. 440, 182 Cal. 538;
Carlisle v. Norris, 109 N.E. 564, 215 N.Y. 400, Ann. Cas. 1917-A 429, affirming 142 N.Y.S. 393, 157 App. Div. 313.

**FEREVA'S REPORTS OF ACCIDENT TO HIS INSURED CLIENTS
ARE NOT IN POINT.**

On the trial of this case over the objections of the plaintiff and respondent a great deal of detailed evidence was introduced showing (1) that Fereva had sold a certain number of policies of insurance for the plaintiff company, and (2) that upon learning of accidents occurring to various insureds to whom he had sold policies he had in turn notified Urquhart orally or by telephone of the occurrence of the accident. In all of these cases, as will appear from an examination of the exhibits and transcript, Fereva did simply what it was his duty to do as an agent licensed by the Insurance Department to act for the plaintiff company.

But in none of these cases does the evidence show that he as an insured made such oral report, and as an insured gave no written notice personally or by agent. Urquhart testified "I don't believe we ever paid a loss for Mr. Fereva." (Tr. 315.)

We refer to the transcript as illustrating the confusion in the evidence brought about by the irrelevant excursion into the field of Fereva's activity in cases where accidents occurred to insureds for whom he had secured policies. The first question propounded to him by defense counsel dealt with "losses in connection with any policies issued to you *or your clients*", and again "any accident or loss to yourself *or clients*"; and "how many accidents you had *or your clients had.*" (Tr. 322.)

Fereva himself shows his confusion in asking: "My own, personally, or any of them? Mr. Goldstein: Q. Any of them. A. Many of them. Q. How many, Mr. Fereva? A. A dozen or fifteen, the persons I had insured." (Tr. 323.)

Fereva then states that there were several of his own and then enumerates them as follows: "A. Yes; one of my salesmen, Mr. Smith; a prospective buyer by the name of Mr. Clark; Mrs. Christianson; at one time I had a partner by the name of Gianachi". (Tr. 323.) But here is where this inadmissible testimony is exceedingly misleading. As appears from the transcript, pages 255-6, Mrs. Christianson was an insured under a policy of her own. So was James R. Smith. (Tr. 252.) Mr. Fereva testified "We placed insurance for

our mechanic who had a car that was in a wreck.” (Tr. 344.) As to Mr. Clark, “the prospective buyer”, and as to Gianachi, the evidence does not show whether they did or did not have policies of their own, and whether if they did such policies were with the General Accident or with some other carrier with which Wentz & Erlin were not concerned.

Furthermore, there is no showing whatever made by the defendants that the persons with respect to whom he reported accidents did not themselves within the policy period give the written notice that they were required to give. Such notice by the nature of things was given in writing by or on behalf of the insured, or the additional insured, and naturally would be given by the one of them coming under the general term “insured” who was actually involved in the accident and acquainted with the facts.

Of course the inter-office communication made by one agent to another agent, whether the latter’s authority was greater or less than the one communicating, is in no sense whatever governed by condition 7 of the policy of insurance which prescribes the duty of an insured. The policy provides in insuring agreement III:

“Definition of Insured. The unqualified word ‘insured’ wherever used includes not only the named insured but also any partner thereof, if the named insured is a partnership, or any executive officer thereof, if the named insured is a corporation, provided such partner or officer is active in the declared operations”. (Tr. 125.)

If there ever was a policy issued by the General Accident covering a partnership of which one Gianachi was a partner, it certainly does not appear in the evidence. Fereva says "At one time I had a partner named Gianachi". If by that he meant that Gianachi had an accident again the record is silent as to whether Gianachi made a written report. Judging from Fereva's testimony every time an accident happened and it came to his attention that an insured for whom he had procured a policy was involved, he promptly notified Urquhart by telephone or in personal conversation; that thereafter the matter was attended to with exceptional promptness. But Fereva does not in his testimony even endeavor to state that the various insureds involved in such accidents did not with due promptness render a written statement and give the information made essential by condition 7 of the policy.

A significant part of Fereva's testimony with reference to giving written reports is found in the transcript, page 332, where in response to the question of Mr. Goldstein he says: "Q. Did you ever file a written report to Mr. Urquhart? A. I don't know of any. *Very few, if any*".

In this connection may we respectfully point out that the Supreme Court of California has explicitly set out reasons why a written notice in compliance with the terms of the policy is essential. In

Purefoy v. Pacific Auto Indemnity Exchange,

5 Cal. (2d) 81, 53 Pac. (2d) 155,

the court says at page 88 of the official report:

“There are decisions holding that the requirement for notice may be satisfied by notice given by the injured person. (See annotation. 76 A.L.R. 38, citing cases.) But in the instant case, the notice was not given promptly after the accident by the injured person. Notice given three and a half months after the accident, especially when it is considered that the notice given at that date was not from the insured, but from the injured person, who was an adverse party, was not reasonably prompt notice, and did not constitute a compliance with the policy. (*Coolidge v. Standard Acc. Ins. Co.*, 114 Cal. App. 716, 300 Pac. 885; *Los Angeles Athletic Club v. United States Fidelity & Guar. Co.*, 41 Cal. App. 439, 183 Pac. 174; *Aronson v. Frankfort etc. Ins. Co.*, 9 Cal. App. 473, 99 Pac. 537.) The information communicated to the insurer three and a half months after the accident otherwise failed to comply with the policy. It contained the bare statement that a named policy holder had been in an accident, without stating even the time and place of the accident. It did not state the ‘names and addresses of all witnesses to the accident’, as required by the policy, nor the ‘conditions surrounding the happening’ of the accident.

“The insurer was deprived of an opportunity to make a prompt investigation while the facts were fresh in the minds of the parties and witnesses, and before physical marks and effects of the accident had been obliterated. As to certain breaches of condition it may more readily be shown whether prejudice had resulted therefrom. But respondent argues with convincing force herein, that the lapse of time which removes the opportunity for prompt investigation, also destroys the

possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations."

In the case now before this honorable court the evidence shows that the insurer was deprived of all the opportunities that it should have had, for example, examination of the cars involved, of witnesses while the facts were fresh in their minds, the physical marks before the effects of the accident had been obliterated, opportunity to negotiate settlement before enmity arose between the parties, checking the nature and extent of the injuries; in fact it was impossible sixty days thereafter to ascertain many of the elements favorable to defendant. With most of this Fereva in his testimony frankly agrees.

So far we have discussed the duties of Fereva arising out of his position as agent, and those duties (a) with reference to the public, and (b) with reference to the communication of information to his principal concerning accidents occurring to cars to cover which the agent procured insurance, and also the general duty of the agent in loyalty and good faith to inform the principal of things which concern it.

IMPUTABILITY TO INSURER OF AGENT'S KNOWLEDGE, NOTICE OR CONDUCT WHERE THE POLICY COVERS THE AGENT'S PROPERTY.

One of the best summaries of the rule we find in the note contained in

83 A. L. R., at page 1525,
where the editor states:

“Ordinarily at least, an insurance agent, in issuing a policy covering his own property, or in making application for such a policy subsequently issued by the insurer, does not act as or stand in the relation of the insurer’s agent. This is an incident to, if not essentially a part of, the general rule announced *supra*, subd. II, and illustrated and applied both therein and in other preceding subdivisions; as such, it is recognized throughout the cases, in the great majority of them without statement or discussion; at this time and place, therefore, no general collection of the cases supporting the proposition will be made. It is equally true, it seems, upon both principle and authority, that at no time during the life of the policy does said agent act as or stand in the relation of the insurer’s agent, as regards the policy and the property thereby covered.”

“*Weatherholt v. National Liberty Ins. Co.* (1924), 204 Ky. 824, 265 S.W. 311 (declaring that the general rule on the subject is that an insurance agent ‘cannot as agent act for the company in procuring and writing fire insurance on his own property, for in such case he acts both for himself and the company’).

“*Zimmermann v. Dwelling-House Ins. Co.* (1896), 110 Mich. 399, 33 L.R.A. 698, 68 N.W. 215 (declaring that an agent for receiving applica-

tions 'ceases to be an agent so long as he acts in a matter in which his personal interest is concerned', and that, if he applies for insurance on his own property, 'as to that property he is no agent of the company').

"Dull v. Royal Ins. Co. (1910), 159 Mich. 671, 124 N.W. 533 (declaring that it seems to be settled law that, if an agent is personally interested in the property insured, no policy issued by him, 'or act done by him in connection therewith,' binds the insurance company unless known and assented to by it).

" 'In contracts between principal and agent, the notice, knowledge, and possession solely of either is not imputed to the other.' Fulkerson v. National Union F. Ins. Co. (1923; D.C.D. Mont.), 291 Fed. 784."

Contention is made by appellants' counsel that there was a waiver of written notice by the plaintiff company. This, however, is not established by the record. When pinned down to concrete cases Fereva was able to give no instance whatever in which he as an insured had given oral notice to Urquhart of a loss under a policy issued by the General Accident to himself as an insured, as distinct from policies issued to others with reference to which he was a soliciting agent. Fereva could not as an agent of the company waive the performance of his own duties as an insured under the policy. He could not claim that the company had notice of his own claim because he knew about it, where both as agent and as insured it was his clear duty to convey the information to the company.

Urquhart on the other hand was not an agent of the General Accident, but was the district representative of Wentz & Erlin, who were general agents for a number of companies, writing business in miscellaneous lines. The handling of claims for the General Accident was clearly without his authority. (See the testimony of both Mr. Wentz (Tr. 194-5) and Mr. Urquhart (Tr. 315-7).)

The policy provided under section 12, as follows:

“No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the corporation from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the United States Manager.” (Tr. 133.)

An insurance company, like any other principal, may limit the powers of its agents. Where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes the contract between him and the company and he is charged with knowledge of its terms, among others, the limitations upon the power of the agent of the company. The authority of an agent to effect a waiver in the face of a limitation denying his power to waive warranties or conditions is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies that may be

regarded as having the power to waive conditions and forfeitures. As to the character of agents authorized to waive such conditions, the rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and to cancel policies.

Porter v. General Acc. etc. Assur. Corp., 30 Cal. App. 198, 157 Pac. 825;

Iverson v. Metropolitan Ins. Co., 151 Cal. 746, 13 L.R.A. (N.S.) 866, 91 Pac. 609;

Sharman v. Continental Ins. Co., 167 Cal. 117, 124, 52 L.R.A. (N.S.) 670, 138 Pac. 708;

Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379.

The most recent case on the subject in our federal courts which we have been able to find, and the facts of which are much stronger for the appellants herein than are the facts in this case, holds that nevertheless there is no waiver or estoppel where nothing is done by the insurance company to lead the insured to believe that he need file no notice as required by the policy. We refer to

Alexander v. Standard Accident Insurance Co. (C.C.A. 10), 122 Fed. (2d) 995.

This ruling is in conformity with the holding in

Peoples Bank of Greeneville v. Aetna Ins. Co. (C.C.A. 4), 74 Fed. 507;

Bakhaus v. Germania Fire Ins. Co. (C.C.A. 4), 176 Fed. 879;

Kansas City Life Ins. Co. v. Davis (C.C.A. 9), 95 Fed. (2d) 952, 957.

In the case at bar there is no showing that Urquhart or anybody else did or said anything whatever within the 60 days following the happening of the accident that would lead or tend to lead Fereva to believe that the giving of a written notice was waived. In fact on that topic he testified (Tr. 340): "Q. At that time Mr. Urquhart made no reply to you? A. No. As I said, our conversation was interrupted. Q. And you had known for some 14 years that Mr. Urquhart was a very deaf man? A. Yes, I had talked with him, yes."

Thereafter, up to December 5, 1941, he never mentioned the subject of notice to Urquhart although both his testimony and that of Urquhart shows that the latter saw him on an average of probably twice a month.

While on this subject we would also call this honorable court's attention to the fact that the label, the subject of so much anxiety on the part of counsel for the appellants, was not attached to or made a part of the policy of insurance with reference to which this action is brought. (See stipulation, Tr. 148-9.) And it does not by its terms purport to waive notice in writing, and even had it been upon this policy the most that could be said in favor of appellants' contention is that notice in writing as required by the policy might have been give to Urquhart for the company.

Passing now to the question as to whether the evidence shows that Fereva gave even an oral notice to Urquhart that might be deemed a compliance with section 7 of the policy, there are many things appear-

ing against him. These we will try to summarize briefly.

**EVIDENCE WARRANTS FINDING FEREVA GAVE NO NOTICE
WHATEVER PRIOR TO 60 DAYS.**

First: As we have just shown by an excerpt from his testimony, Fereva knew for 14 years that Urquhart was very deaf. (Tr. 340.) He admits that when he claims to have spoken to Urquhart the latter did not reply. He does not claim to have spoken to him in any tone of voice above the ordinary, and Fereva's voice was so low on the witness stand that both the trial judge and his own counsel admonished him "to speak a little louder". (Tr. 328.) The brief statement claimed to have been made to Urquhart was the whole conversation. He did not ask Urquhart to do anything about it. "I just reported to him." "Our conversation was interrupted at that time." (Tr. 338-9.) "The conversation wasn't completed".

We suggest to this honorable court that this does not constitute giving notice to the plaintiff, this alleged talk to a very deaf man. Courts have frequently considered the effect of deafness where one party endeavors to bind the opposite party by some statement made in his presence or in the presence of his agent. In

Wright v. Tatham, 5 Clark & Finnelly 670, 722
(7 House of Lords, English Reports Reprint,
p. 559 at 578),

the rule is expressed by Baron Alderson as follows:

“* * * I agree that conversation addressed to Mr. Marsden, or conduct towards him, would have been evidence if he were shown to be cognizant of it. But why? Because it explains and illustrates his conduct—which is in effect an act done by him—in hearing the one and receiving the other. His manner at the time—even though he made no answer—would be proper to be left to the jury. But a letter is like a conversation in which you have no such accompanying conduct to be explained or illustrated. It is like conversation addressed to a man when asleep or intoxicated, or *which he did not hear*; or conduct towards him in his absence; which would not be admissible.”

In

Parulo v. Philadelphia & R. Ry. Co., 145 Fed. 664, at 668, to 672,

the situation is thoroughly discussed and many authorities cited, the court saying at page 669:

“If the party in whose presence the statement was made was physically and mentally able to hear and understand, and sufficiently near to hear, and the statement was of a character that would under the circumstances naturally call upon him for a denial or qualification if untrue, and he was at liberty to deny or qualify, then it may be given in evidence against him; otherwise, not.”

The same situation is referred to in

Henderson v. Northan, 176 Cal. 493, 497, 168 Pac. 1044.

And again in

Smith v. Smith, 173 Cal. 725, 732, 161 Pac. 495,

where, however, very loud tones were used by the speaker.

Devonshire v. Stubbs, 238 N.Y.S. 707, 135 Misc. 886.

And that the court will take notice and pay regard to the improbability of a person's hearing, see

Ramsay v. Ryerson, 40 Fed. 739.

On the other hand Urquhart flatly denies that Fereva ever made such statement to him. (Tr. 319-320.)

Weighing the evidence in this case is it not significant indeed that with the friendship of many years standing that existed between Fereva and his wife on the one side, and Urquhart on the other, Fereva should admittedly have remained absolutely silent on the subject when he met Urquhart until December 5, 1941, when he called at Urquhart's office in preparation for trial, and left immediately the same evening for Chico to report his alleged conversation to Mr. Hogle and Mr. Goldstein.

Alleged conversations that took place, one between Fereva and his wife in which he told her that he had already reported the loss to Urquhart (Tr. 349), and the other, the remark made after the termination of the proceedings on motion for new trial in the Dickinson case to Mr. Goldstein by Fereva at the court house in Auburn (Tr. 394-5), were properly given no weight.

The conversation between Fereva and his wife, and that between Fereva and Mr. Goldstein, were clearly hearsay and inadmissible. The rule as stated in

Nichols on Applied Evidence, Vol. 2, p. 1364,
is as follows:

“Of party with third person in absence of adverse party. Conversations between a party and a third person in the absence of the opposing party are not admissible against the latter.”
Citing

“ ‘In an action for rent, conversations between plaintiff and the person who had formerly rented the premises to defendant, and between them and third persons, relative to rental thereof, are not admissible against defendant, who was not present at such conversations, and knew nothing about them.’ ”

Ambrose v. Hyde, 145 Cal. 555, 79 Pac. 64.

“Conversations, in the absence of plaintiff, between defendant and others, as to the purpose of a deed of plaintiff’s land to defendant, were incompetent.”

Bell v. Staacke, 141 Cal. 186, 74 Pac. 774;

Fee v. Wells, 65 Colo. 348, 176 Pac. 829;

Farmer v. Hughes, 38 Colo. 318, 88 Pac. 191;

Whitman v. McComas, 11 Idaho 564, 83 Pac. 604;

Wilson v. Vogeler, 10 Idaho 599, 79 Pac. 508;

Ferrat v. Adamson, 53 Mont. 172, 163 Pac. 112;

Kennedy v. Kennedy, 27 Nev. 152, 74 Pac. 7, 77 Pac. 597;

McNicol v. Collins, 30 Wash. 318, 70 Pac. 753.

Especially where self-serving declarations.

Hammett v. State, 42 Okla. 384, 141 Pac. 419,
Ann. Cas. 1916D, 1148.

“So accused’s wife’s testimony as to a conversation with her husband, as to whose return home and matters connected therewith on the morning after the alleged crime she had testified, held incompetent and hearsay.”

State v. Orcutt, 123 Wash. 651, 212 Pac. 1066.

Second: Carefully weighing the testimony of Fereva to the effect that he made the statement to Urquhart which appellants would have us believe constituted a notice to the plaintiff, several things are glaringly inconsistent with his position. He is flatly contradicted by Walter Henretty, and by Urquhart himself. The most convincing inference against him must be drawn from his failure to object to any one of the three letters (Tr. 166, 169, 171), reserving the plaintiff’s rights and written him by Mr. Murray of the claims department. His conduct during the 60 days interval that elapsed before written notice was made out by him tends to disprove his contention. His whole conduct is not that of one who had been some 14 to 20 years an insurance agent and a garage and repair man, deriving a large proportion of his income from insurance companies.

Henretty’s testimony is that Fereva’s statement was taken down in shorthand by Henretty in Fereva’s presence, and read as recorded. Henretty testified that he had a conversation with Fereva on April 26, 1940, as follows:

“A. Well, I asked him why he had not reported the matter, and pointed out it was more than two months, and asked him why he hadn’t

done it. 'Well,' he said, 'the reason I did not report it was that I didn't feel it was of enough importance, and the highway patrol exonerated me completely.'

Mr. Scott. Q. What, if anything further, did Mr. Fereva say to you at that time upon that subject?

A. Well, there was no further elaboration of it. He might have repeated the same—I pointed out to him that it was going to be a serious handicap to have delayed it so long, and he might have repeated it—I didn't write that repetition down. He might have repeated that the officers had exonerated him is why he hadn't done anything about it." (Tr. 204-205.)

And on cross-examination he states:

"The Witness. I can recollect it, your Honor, I can remember the occasion quite well. I can remember the phraseology quite well. I don't have to refer to those notes.

Mr. Goldstein. Q. You say you remember it quite well?

A. Yes.

Q. And this conversation took place on the 26th day of April, 1940?

A. That is right.

Q. You have had dozens and dozens of accidents since that time that you have investigated, isn't that true?

A. Very probably.

Q. And you have been spoken to a great many times by people, witnesses, insureds, and other persons?

A. Very probably.

Q. And do you mean to say now you can recall and recite a conversation that you had with those

people on any particular day without referring to notes?

A. Maybe not, but this is different Mr. Goldstein.

Q. What impresses this on your mind?

A. I had a number of other conversations with Mr. Fereva on it. This very thought ran through this whole case, his failure to report the same, and the prejudice that arose. It came up time after time.

Q. Mr. Henretty, you were talking about a written report.

A. What do you mean, written report.

Q. To Mr. Fereva in this conversation. Weren't you talking about a written report?

A. No; any kind of notice whatsoever.

Q. Did you make any such statement to him?

A. What do you mean, did I make any such statement to him?

Mr. Goldstein. Strike that.

Q. Did you ask him whether he reported it at all to anybody?

A. No. He said he had not, and his reason was this:—

Q. Isn't it a fact that what you were talking about was a written report?

A. No.

Q. Isn't it a fact what you considered was prejudicial was the failure to file a written report?

A. No. What I figured was prejudicial was his failure to tell anybody about it. For example—

Q. Go ahead and finish your answer.

A. In working on the case we ran into different snags. People told us, 'Well, I can't remember. Why didn't you come to see us at the time?' Well, I didn't know about it. I told Mr.

Fereva several times, and he heard these people, some of them told me, 'Well, if you asked me earlier I might have remembered.' I said to him, 'There you see what happens by reason of not telling us about it. You should have told us in March.' '' (Tr. 208-210.)

Against this is the denial of Fereva appearing at transcript pages 333-4:

“Q. Now, did he ask you anything as to why you did not file a written report? Do you remember any conversation regarding that?

A. Well, he asked something about if a report had been filed.

Q. What kind of a report was he talking about?

A. I presume he was referring to a written report.

Q. Did you tell him you had not filed a written report?

A. I believe I did, yes.

Q. Did you ever tell him you had not notified Mr. Urquhart personally, or orally?

A. No, I didn't.

Q. Did he ever ask you about that at all?

A. Yes; he asked me one question on that.

Q. What did you tell him, that is what I want to find out?

A. Well, he asked me why this wasn't reported—I can't quite place it. I said, 'Yes, it has been reported.' He said 'Why didn't you report it again?' I said, 'I didn't think it was of enough importance, because the Highway Patrol exonerated me, and Mr. Urquhart had taken no further action with it, and that was the length of my report.'

Q. That was the sum and substance of your conversation with Mr. Henretty?

A. Yes, sir.

Q. And when he was talking to you was he referring to this written report?

A. I presume he was." (Tr. 333-4.)

We respectfully submit that the insurance background and experience had by the two parties to the conversation should be taken into consideration in scanning and weighing the evidence. What could be more amazing and ridiculous than Fereva's statement above "I said yes, it has been reported. He said 'Why didn't you report it again?' "

**SIGNIFICANCE OF FAILURE TO MAKE DENIAL OR PROTEST
LETTERS RESERVING COMPANY'S RIGHTS.**

Another consideration weighing heavily against Fereva is his silence, his utter lack of any protest or objection to the company's letters setting forth the insurer's position and reserving rights, all three of which were sent to him by registered mail, namely, the letter of April 29, 1940 (Tr. 166-7), December 30, 1940 (Tr. 169), January 28, 1941. (Tr. 171.) The failure to reply to letters of this character and under these circumstances, supplies strong inferential evidence that the statements contained in the letters are true, the strength of the inference depending largely upon the question as to whether a reply thereto was or was not naturally to be expected under the circumstances. The rule is stated in

Simpson v. Bergmann, 125 Cal. App. 1, at p. 8,
13 Pac. (2d) 531,

as follows:

“While ordinarily the fact that a letter is received containing false statements does not impose upon the recipient the duty to reply thereto, nevertheless this depends upon the circumstances, and, as said by Mr. Wigmore, ‘each case must stand upon its own facts’. (2 Wigmore Evidence, sec. 1073.) The test is found in whether the circumstances are such that in the ordinary practice of mankind the party receiving it would have answered it if he did not acquiesce in the statements it contained. (22 Cor. Jur., Evidence, sec. 364, p. 326.) The ground of admissibility, however, is not that the letter affords any proof that the statements therein are true, but that silence, when such statements are calculated to draw forth a reply, may be the ground for an inference that the statements are true. (*Keeling-Easter Co. v. Dunning*, 113 Me. 34, 92 Atl. 929; *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952.) Here the inference sought to be drawn was the existence of a contract; and the instances in which such letters have been admitted have usually been cases where they were part of a mutual correspondence or referred to an existing contract. (See notes, Ann. Cas. 1917D, 790; 8 A. L. R. 1163; 34 A. L. R. 560; 55 A. L. R. 460.)”

It is very true, as stated by the United States Supreme Court in

Leach & Co. v. Pierson, 275 U.S. 120, 72 Law.
Ed. 194, 55 A. L. R. 457, 459:

“A man cannot make evidence for himself by writing a letter containing the statements that he

wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission."

Such an unanswered letter is admissible where it relates as here to an existing contract between the parties.

First National Bank v. Ford (Wyo.), 216 Pac. 691, 31 A. L. R. 1441.

And see cases collected in
8 A. L. R. 1166-7.

We find the rule set out in

22 *Corpus Juris*, Title "*Evidence*", p. 322, sec. 357:

"Significance of Failure to Reply.—In General. The failure of a party to reply to a statement made in his presence or hearing is significant only where the nature of the statement, and the circumstances under which it was made, are such as to render a reply natural and proper. It is always competent to show silence or acquiescence of a party where the facts stated tend to expose him to the consequences of a criminal act, or would inflict a civil injury, or injuriously affect his title to real or personal property, or limit his right to recover damages for a serious injury, as under such circumstances it would be reasonable to expect a denial of the statement if it was not true."

And at page 326, section 364:

“When Admissible. Notwithstanding the general rule just stated, there are circumstances under which unanswered letters are competent evidence of admission by acquiescence in the statements therein contained. The test of admissibility is found in whether the circumstances are such that in the ordinary practice of mankind the party receiving the letter would have answered it if he did not acquiesce in the statements contained therein.”

See

Bend v. Forrest (C.C.A. 1), 213 Fed. 763, 765-6.

As pointed out in

22 *Corpus Juris* 327, sec. 367,

the probative force of failure to deny a statement depends on the circumstances:

“Probative Force. Failure to deny a statement in a letter is merely a circumstance to be weighed in connection with other evidence bearing upon the correctness of the statement, and it has less probative force than would attach to a failure to reply to an oral statement made directly to the party.”

Applying then the test suggested by the United States Supreme Court, *supra*, the background in this case was certainly one that renders the failure of Fereva to assert to anyone connected with the plaintiff company even the idea that he had given notice to Urquhart before April 26, 1940, and the failure to reply to any of these letters, of most decided significance. This failure should be taken into consideration

in arriving at a determination as to whether Fereva is or is not telling the truth.

Fereva had been in the automobile business for 14 years. (Tr. 173.) For over 10 years he had represented the plaintiff company. (Tr. 387.) Prior thereto he had represented other companies under Urquhart. He knew Urquhart personally, intimately. He was a "very particular friend". (Tr. 177-8.) He was in business with Urquhart for some years but connected with the plaintiff company at a time when Urquhart was agent for other companies. (Tr. 349-50.) He had been a guest at their home and an intimate friend whom they had known for 15 or 16 years. (Tr. 352.) He visited two or three times a month at Fereva's place of business. (Tr. 354.) Yet Mrs. Fereva never discussed the matter with Urquhart. (Tr. 354.) Urquhart testified he never heard of the accident until April 26th, sixty days following its occurrence. (Tr. 319-320.)

Mrs. Fereva testified that there was a total silence during the 60 days from the accident up to April 26th. (Tr. 353.) Fereva had represented the plaintiff, General Accident, for over 10 years, and remained its agent. (Tr. 381-385.) He had Urquhart's telephone number and no difficulty communicating with him. (Tr. 378.) He never told Urquhart that the letter of May 3rd, Exhibit 6, was a mistake. (Tr. 381.) In compliance with that letter he went to Mr. Gerald Desmond, who acted as his attorney, furnished under reservation of rights by the insurance carrier. Despite his friendliness with the plaintiff company itself, and

despite the fact that he was an agent, he never wrote the company calling attention to his claim that he notified Urquhart, and made no reply to the registered letters. (Tr. 373-4.) He knew it was important to have the insurance carrier check the damage to the Dickinson car, alleged to amount to \$437.00, but never even told the company that he had it in his garage for 10 or 12 days. (Tr. 376-8.) He knew that inspection of the car was essential. He knew that it came under the damage feature of his policy. (Tr. 377.) The policy covered property damage, with limit of \$5000. (Tr. 121.) He knew Henretty; had known him for years; knew his position as an investigator; but never communicated with him. (Tr. 323-4.)

Certainly there exist in this situation all of the elements creating a powerful inference that Fereva never made any such statement to Urquhart on April 26, 1940. He acted upon the letters sent by the company reserving its rights; he remained in frequent contact with Urquhart. His relations with Henretty he asserts were very close during the investigation and preparation for trial and upon the trial. It must be assumed that his relations with Mr. Gerald Desmond, his attorney, were close.

It is odd indeed that even after the plaintiff company notified him by letter dated January 28, 1941, that it withdrew from his defense and left him to his own resources, he still made no suggestion to the company or anybody representing the company, that he claimed he had given the required notice to Urquhart. And it appears from the record that the first time that

he mentioned his claim to any representative of the company was on the taking of his deposition in this action on May 10, 1941, at Sacramento. (Tr. 339-340.)

FEREVA'S CONDUCT INCONSISTENT WITH STATEMENTS.

Looking at the matter from another point of view, and endeavoring to weigh his statement in the light of his conduct, Fereva was an active insurance agent, and as we have pointed out a fairly substantial portion of his business as a garage and repair man was derived from payments by insurance companies for damage done to this and that and the other car. (Tr. 376.) It was quite natural for him to have a repair job and have it paid for by one or another insurance company. He knew it was one of the most essential elements where insurance was involved that there should be an inspection of the car. As an insurance man, repair and garage man, he had for many years been accustomed to that phase of the business. In this case he knew that the Dickinson car if damaged by his negligence came under his policy. (Tr. 376.) He knew that it was highly important to have the insurance carrier check to ascertain the damage. "We might say that is elemental in your business isn't it? A. Yes." (Tr. 377.) Yet he left that car in his garage without its being checked by any representative of the carrier for 10 or 12 days, and then delivered it back to Dickinson.

The same was true with reference to his own automobile or tow car, which he repaired with speed.

The same was true as to the highway conditions, the marks that were made in the muddy ground and obliterated by weather conditions. (Tr. 389.)

His tow car was repaired in from 5 to 12 days. (Tr. 390.) It did not occur to him to notify the company about either of these cars. (Tr. 390.)

All of these things, essential to the ascertainment of truth by the carrier, the importance of which he frankly admits, were not brought to its attention. In fact he says:

“Q. And knew Mr. Henretty, and knew Mr. Henretty almost as long as Mr. Urquhart?

A. Not personally, no. I never knew Mr. Henretty personally.

Q. You knew him as the trouble man, investigating and all that?

A. Yes, sir.

Q. Now then, in spite of your close relationship with Urquhart and with the company, or with Wentz & Erlin, it never occurred to you, did it, to call the company's attention further, or Urquhart's attention, or the attention of Mr. Wentz, the attention of Mr. Henretty, or anybody else, to your alleged conversation had in front of your garage?

A. Not unless I talked it over with Mr. Urquhart in my place of business.” (Tr. 384-385.)

Finally we respectfully urge that giving Fereva the benefit of every possible doubt in this case it yet remains clear that he did not even give Urquhart an oral notice that would fulfill the requirements of condition 7 of the policy, to-wit:

“Notice of Accident—Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses. * * *”

Purefoy v. Pacific Auto Indemnity Exchange,
5 Cal. (2d) 81, 88, 53 Pac. (2d) 155;

Appleman's Work, Automobile Liability Insurance, p. 225;

Cooley's Briefs on Insurance, Vol. 7, Second Edition, at page 5888,

points out

“When, however, there is a plain requirement for ‘full particulars’ of the accident or death, it cannot be entirely ignored.”

And cites in support of the rule the following:

Standard Accident Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604;

Stephenson v. Bankers' Life Ass'n, 108 Iowa 637, 79 N. W. 459.

“Though any succinct and intelligent statement, giving the information called for in a provision of the policy requiring notice, is sufficient to put the insurer upon inquiry, to determine whether he is liable, the beneficiary of an accident policy must, where she was convinced that insured was dead as a result of accident, but did not know of the manner of his death, give notice

in accordance with the stipulation that claimant must deliver immediate written notice of any accident with full particulars. *Tuttle v. Pacific Mut. Life Ins. Co.*, 58 Mont. 121, 190 P. 993, 16 A. L. R. 601."

To the same effect is

Aronson v. Frankford Accident and Plate Glass Ins. Co., 9 Cal. App. 473, 99 Pac. 537.

As we have pointed out, according to his testimony Fereva fully understood the importance of notice and yet the only remark made by him to the deaf man, Urquhart, is found in transcript pages 328-9:

"Bob, I want to report a little crackup I had down the highway the other morning with my tow car." I said, "I was called out in the morning to go out to pull a car out of the ditch, and while I was towing the car out of the ditch another car ran into the car we were towing out. There were several people injured; they were scratched and bruised, but nothing serious."

Time and again Fereva protests that that was the extent of his conversation, and that he was interrupted and "left Urquhart standing in front of the building, to wait on customers". (Tr. 338-9.)

He gave no reasonable information respecting the time of the accident.

Then Fereva continues:

"Mr. Scott. Q. You didn't tell him where the accident happened?

A. Why, nothing more than 'down the highway'.

Q. You didn't even tell him what highway, did you?

A. I don't remember telling him between Lincoln and Roseville; but we were interrupted, that is why. We just got into our conversation and it was interrupted.

Q. You told him, 'Just the other day I had a little crackup down the highway with the tow car'?

A. Yes, sir.

Q. You didn't tell him down what highway?

A. Probably not.

Q. You didn't tell him anything but just what I asked you, namely, this: 'Bob, I had a little crackup down the highway with the tow car the other morning. We had a call to tow a car out of the ditch, and while we were towing them out a car ran into the car which was being towed. There was quite a little crackup, and they were cut and bruised, but nothing serious.' Now, that is all you told him?

A. Probably.' (Tr. pp. 339-340.)

In other words he gave no reasonable clue either as to time or place of the accident.

Fereva and Campbell took the two Dickinsons and Kemp to the hospital for medical treatment. Yet he did not give Urquhart the "names and addresses of the injured". The record discloses that there were witnesses available. There was Campbell, his foreman; there were at least two police officers and the physicians who attended the injured, and "several" others. (Tr. p. 335.) And yet he gave neither the name nor the address of any one of these witnesses.

He said nothing whatever respecting the circumstances of the accident, and what he did say about the character of the injuries was "They were cut and bruised but nothing serious".

The complaint in the Dickinson case against him, and the verdict returned thereunder, proves this to have been utterly untrue as the injuries to Mrs. Dickinson were serious. And the complaint in the Kemp case indicates that his injuries were allegedly at least more serious than those of the Dickinsons. There was also damage to Kemp's car coming within the \$5000 property coverage of the policy. (Tr. 121.)

Taking Fereva's testimony at par, to use the stock market colloquialism, and assuming that he uttered the remarks he says he did, to this very deaf man, still those remarks were not a substantial or attempted compliance with the requirements of condition 7. Tested by the rule in the *Purefoy* case, *supra*, and the other authorities just cited, his remarks were in no sense a compliance with the condition, and would not have constituted the notice required under the policy of insurance even had Urquhart heard the remarks and reported them to the plaintiff company.

A long line of decisions has established the rule in California that the test as to whether an agent has power to bind the company by his knowledge or his acts is whether or not such agent is one clothed with authority to consummate a contract of insurance. Under this rule clearly Urquhart was not an agent of the company.

We respectfully refer to the following cases:

- Madsen v. Maryland Casualty Co.*, 168 Cal. 204,
142 Pac. 51;
Kruger v. Fire & Marine Ins. Co., 72 Cal. 91,
13 Pac. 156;
Westerfeld v. New York Life Ins. Co., 129 Cal.
68, 58 Pac. 92, 61 Pac. 667;
Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23
Pac. 869;
Bayley v. Employers' Liab. Assur. Corp., 125
Cal. 345, 58 Pac. 7;
Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac.
138;
Iverson v. Metropolitan Life Ins. Co., 151 Cal.
746, 91 Pac. 609, 13 L. R. A. (N.S.) 866;
Raulet v. Northwestern etc. Ins. Co., 157 Cal.
213, 107 Pac. 292;
Mackintosh v. Agricultural Fire Ins. Co., 150
Cal. 440, 89 Pac. 102;
Northern Assurance Co. v. Grand View B. A.,
183 U. S. 300, 46 Law. Ed. 213;
Stipcich v. Metropolitan Life Ins. Co., 8 Fed.
(2d) 285, 286-7;
Odergard v. General Casualty and Surety Co.,
44 Fed. (2d) 31.
-

GIVING OF NOTICE NOT WAIVED.

We respectfully submit that in this case the giving of notice by Fereva, the insured, as required by condition 7 of the policy, within the period set by the

policy, and by section 551 of the Insurance Code, was not waived. Fereva was the insured under the policy here in question. Fereva was also a *soliciting* agent of the plaintiff corporation, duly licensed as such by the Insurance Department of the State of California. His appointment and certificate are in evidence. (Plaintiff's Exhibit 4 and Defendants' Exhibit B.) However, with respect to the policy of insurance under which he was the insured his duties were entirely regulated by the terms of the policy. His knowledge of his own accident was not imputed to the plaintiff corporation by reason of the fact that he was its agent. This point is discussed and determined in

Utica Sanitary Milk Co. v. Casualty Co. of America, 210 N.Y. 399, 104 N.E. 918.

Gilmore v. Eureka Casualty Co., 123 Cal. App.

20, 27, 10 Pac. (2d) 810,

a case in which Gilmore was the agent of the defendant casualty company, and at the same time "wrote the said policy of insurance for his own benefit", he being the actual owner of the automobile and in possession thereof at the time he as general agent executed the contract of insurance in the name of another insured. The court held:

"Appellant was the general agent of respondent and really wrote the policy for his own benefit. He had knowledge of the true facts of the transactions which he did not communicate to his principal. A general agent who in effect writes a policy of insurance protecting himself against loss should not be permitted to recover against his principal on the policy where he has knowl-

edge that material representations made in the policy are untrue and does not communicate such knowledge to his principal.”

It is a sound principle of law that no oral agreement made before or contemporaneously with the written contract could be effectual to vary the provisions of the insurance policy.

A very celebrated case on this subject is found in
Lumber Underwriters v. Rife, 237 U.S. 605,
609, 35 S. Ct. 717, 59 L. Ed. 1140.

The defendant Fereva cannot contend that irrespective of the policy contract some agreement or understanding existed with reference to himself as a favored insured that he was not to be called upon to give written notice of accident, or to give notice containing substantially the items of information called for by condition 7 of the policy.

This rule is followed by the Circuit Court of Appeals, Ninth Circuit, in the case of

Eddy v. National Union Indemnity Co., 78 Fed. (2d) 545. See this case on rehearing in 80 Fed. (2d) 284, Judge Wilbur speaking for the court.

See

Lumber Underwriters v. Rife, 237 U.S. 605, 609, 35 S. Ct. 717, 59 L. Ed. 1140,
in which case Justice Holmes adds as a conclusion at page 610:

“Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity.

What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

This has always been the law in the State of California. See

Madsen v. Maryland Casualty Company, 168 Cal. 204, 142 Pac. 51,

which expressly applies the federal rule as the same is found in

Connor v. Manchester, 130 Fed. 743, 70 L. R. A. 106;

Gladstone v. Columbia Life etc. Co., 33 Cal. App. 119, 164 Pac. 416,

which cites and applies the rule as found in the federal case of

New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 29 Law. Ed. 934.

On the point that the payment of one loss under a policy does not operate as an agreement to pay a second different loss, or constitute a waiver so far as the second loss was concerned, see

Northwestern National Insurance Co. v. McFarlane (C. C. A. 9), 50 Fed. (2d) 539.

We also refer to

Coleman Furniture Corporation v. Home Insurance Co., 4 Fed. Supp. 794,

wherein a waiver made with respect to one breach of the policy did not extend to any subsequent breaches.

The testimony shows Urquhart was not a soliciting agent; that he was not an employee of the plaintiff corporation; that he was a special agent appointed by Wentz & Erlin, with limited authority. As such he came under the provisions of

Sec. 1640 of the California Insurance Code, which provides that "Article 1" dealing with "agents", brokers', and solicitors' qualifications" does not affect the following:

"(g) Persons whose employment does not include the solicitation, negotiation, or effecting of contracts of insurance and who do not sign policies or other evidences of insurance.

"(h) Salaried traveling employees or officers of insurers of the type commonly known as special agents, while performing duties and exercising functions such as are commonly performed by special agents, if such persons:

(1) Do not effect insurance.

(2) Solicit or negotiate insurance only as a part of and in connection with the business of an insurance agent licensed under this chapter."

Furthermore Mr. Urquhart was not licensed by the plaintiff corporation as its agent. We submit the rule expressed by the California Supreme Court applies:

"Whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offer no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiff."

Westerfeld v. New York Life Insurance Co.,
129 Cal. 68, 61 Pac. 667.

In fact this situation is stronger because Urquhart was not even "a particular agent". He was doing special work for Wentz & Erlin. He was not an agent of the plaintiff at all.

We also refer to the case of

Moriarty v. California Western States Life Ins.

Co., 22 Cal. App. (2d) 260, 70 Pac. (2d) 684, wherein it was held even in the case where an agency was shown that an estoppel cannot be predicated upon a transaction with an agent of an insurer where there is no evidence to show that the agent had authority to waive any provision of the policy, and there was much evidence that he had no authority to change the policy. In that case a directed verdict was rendered, the court holding that there was nothing to show that Benjamin, the agent, had any authority on behalf of the insurance carrier to waive any provision of the policy. (See 22 Cal. App. (2d) p. 268.)

Fereva related how he as an agent had given word of the happening of accidents in which the cars of *various policyholders* were involved. And he told how the plaintiff corporation's organization handled all of these matters expeditiously on receipt of notice. Emphasis was placed repeatedly upon the fact that *he* had not signed written notices in these instances. No one expected an agent to do so. And when it comes to a careful analysis and checkup of the instances testified to by him it is revealed that in no case whatever, with possibly one exception, was he the *insured* under the policy or making any report other than with reference to accidents in which the cars of his "clients" were involved.

What force then is to be attached to his admission:

“Q. Did you ever file a written report to Mr. Urquhart?

A. I don't know of any; *very few* if any.”
(Tr. 332.)

Our California courts have held that indulgence extended one party to a contract by the other does not constitute a waiver. Even had plaintiff in one or more instances not insisted on a written report from Fereva (assuming one to have been forthcoming from him as an *insured*) this would not have constituted a waiver of written notice under condition 7 excusing notice of subsequent accidents on later and different policies.

Kerns v. McKean, 65 Cal. 411, at 416, 4 Pac. 404.

Nowhere in the whole record is there any evidence that anyone connected with the plaintiff corporation assured him that condition 7 was meaningless, or that he or any other policyholder was not expected to comply with it. As pointed out by our California courts compliance with this requirement of the policy is of the very essence of the insurance contract, and noncompliance therewith is prejudicial as a matter of law.

Distributors Packing Company v. Pacific Indemnity Co., 21 Cal. App. (2d) 505, 508, 70 Pac. (2d) 253.

It must be remembered that to establish a waiver the burden of proof is upon the party claiming a

waiver to prove it by such evidence as does not leave the matter doubtful or uncertain.

Aronson v. Frankford Accident and Plate Glass Ins. Co., 9 Cal. App. 473, 99 Pac. 537.

This case is in some points similar to

Alexander v. General Ins. Co. of America, 22 Fed. Supp. 157.

The well considered California case of

Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N.S.) 670,

clearly defines the extent of the authority of the agent required to be established to enable him to waive conditions of the policy.

Urquhart had no such extensive authority. Urquhart was not even a soliciting agent for the plaintiff corporation; he was merely local representative at Sacramento for the firm of Wentz & Erlin, and within the category enumerated in the Insurance Code, section 1640, subdivisions g, h-1 and 2.

The importance of compliance with condition 7 of the insurance policy is pointed out in numerous California cases, of which

Purefoy v. Pacific Auto Indemnity Exchange, 5 Cal. (2d) 81, 53 Pac. (2d) 155

is an example.

An excellent statement of the reason for the requirement is found in

Travelers' Insurance Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 459.

And we also refer to

Lewis v. Commercial Casualty Ins. Co., 142 Md. 472, 121 Atl. 259.

Appellee respectfully submits that this cause was properly within the equity jurisdiction of the District Court; that the treatment of the verdicts as merely advisory verdicts was proper, not only because it was a suit in equity but because equity jurisdiction attached by reason of the filing of cross-claims based on equitable grounds; that furthermore defendants are estopped from attacking the action of the court which resulted from defendants' motion for findings and judgment; that the findings of the court that no notice whatever was given to the plaintiff Insurance Company by Fereva prior to 60 days after the happening of the accident is amply supported by the evidence; that with that finding the charges of waiver and estoppel fall; that the court properly proceeded to final judgment particularly because it was conceded by all the defendants that Fereva gave no notice in writing as required by condition 7 of the policy prior to the expiration of said period, and that it was also conceded that the handling of the defense of the actions in the state court was under full reservation of rights made by letters sent to Fereva by registered mail.

We respectfully submit that the judgment of the court should be sustained.

Dated, San Francisco,
March 20, 1944.

MYRICK & DEERING AND SCOTT,
JAMES WALTER SCOTT,
Attorneys for Appellee.

No. 10,501

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
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"Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

REPLY BRIEF FOR APPELLANTS DICKINSON.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
Chico, California,

Attorneys for Appellants Dickinson.

FILED

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PAUL P. O'BRIEN,
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REPLY BRIEF FOR APPELLANTS DICKINSON.

FOREWORD.

The headings herein correspond to those adopted in the opening brief.

1. THE DEFENDANTS DICKINSON WERE DENIED THE RIGHT OF TRIAL BY JURY. (Op. Bf. p. 11.)

These appellants pointed out in their opening brief (pp. 11-17) that they were entitled to a jury trial as a matter of right; that they duly demanded a jury trial and a jury returned a verdict in their favor; and that

the trial court erred in rejecting the verdict as merely advisory and making and entering findings and judgment contrary thereto.

The first contention of appellee in answer to the point is that "This cause is within equity jurisdiction and court properly held verdicts advisory". (Bf. App. p. 2.) The contention is not sound. It is opposed to the decision of this court in *Pacific Indem. Co. v. McDonald*, C.C.A.Or. 1939, 107 F. 2d 446, cited by appellants at pages 12 and 16 of their brief as decisive on the question. Although the brief for appellee cites 116 cases no reference to the *McDonald* case is therein contained.

The law is now thoroughly settled that an action for declaratory relief "is neither legal nor equitable but is sui generis".

Pacific Indem. Co. v. McDonald, C.C.A.Or. 1939,
107 F. 2d 446, 448;

United States F. & G. Co. v. Koch, C.C.A.Pa.
1939, 102 F. 2d 288, 290;

Great Northern Life Ins. Co. v. Vince, C.C.A.
Mich. 1941, 118 F. 2d 232, 233-4;

Hargrove v. American Cent. Ins. Co., C.C.A.
Okl. 1942, 125 F. 2d 225, 228;

Home Ins. Co. of New York v. Trotter, C.C.A.
Mo. 1942, 130 F. 2d 800, 802-3.

In *Home Ins. Co. of New York v. Trotter*, C.C.A. Mo. 1942, 130 F. 2d 800, it was said, at page 802:

"The proceeding was not, as appellants now assert, a suit to invoke the equitable jurisdiction of the court but, on the other hand, was a typical pro-

ceeding for a declaratory judgment as, indeed, appellants entitled it when brought and as the district court concluded at the trial.”

And in *Hargove v. American Cent. Ins. Co.*, C.C.A. Okl. 1942, 125 F. 2d 225, it was said, at page 228:

“If the insured had filed suit on the policies, the asserted remedy would have been legal in its nature and either party would have been entitled to a jury on timely demand as provided by the rules of civil procedure. In this event, the insurers could have asserted the same remedy as a legal or equitable defense to the legal action to recover. *Pacific Indemnity Co. v. McDonald*, 107 F. 2d 446, 131 A.L.R. 208. The insurer therefore had a plain and adequate remedy at law and the issues tendered were basically legal in their nature, and the case was triable as of right by jury. *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed 440. Cf. *American Life Ins. Co. v. Stewart*, 300 U.S. 203, 57 S.Ct. 377, 81 L.Ed. 605, 111 A.L.R. 1768.”

See, also:

Ettelson v. Metropolitan Life Ins. Co., C.C.A. N.J. 1943, 137 F. 2d 62, 65-6.

There can be no doubt under the above cases that defendants Dickinson were entitled to a jury trial as a matter of right and that the jury verdict returned in this case was binding on the trial court. *Prima facie*, therefore, it was palpable error for the trial court to reject the verdict as merely advisory.

The second contention of appellee in answer to the said point is that appellants are estopped from assert-

ing the error. (Bf. App. p. 4.) This contention is bot-tomed on the claim that appellants misled the court into believing that the verdict was merely advisory by moving for and proposing findings after the jury verdict. The contention is not sound.

The demand for jury trial was timely and unquali-fied and strictly in accord with Rule 38 (a) of the Federal Rules of Civil Procedure, providing:

“(b) Demand. Any party may demand a trial by jury of the issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.”

No withdrawal of the motion for jury trial was ever made; no motion was ever made by appellee question-ing the right of trial by jury; no intimation or finding was ever made by the court that right of trial by jury did not exist; no motion was ever made by appellee for an advisory jury; no intimation was ever made by the court that the jury would be advisory. Addressing itself to such situation, Rule 39 of the Federal Rules of Civil Procedure provides:

“(a) By Jury. When trial by jury has been de-manded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and en-

tered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.”

“(c) Advisory Jury and Trial by Consent. In all actions not triable by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.”

On the record, it will be obvious to the court that the action went to trial as one in which the defendants Dickinson were *entitled to jury trial as a matter of right*. The record shows that a jury was “empaneled and sworn to try the cause”. (T. 115.) The record shows that the jury charge was full and that its form and contents conformed to what is usual in jury trials as of right. (T. 400-418.) The record shows that no objection was made or exception taken to the form of verdict submitted to or returned by the jury respecting the defendants Dickinson. That such form was the usual one in actions by an injured person to recover on a policy of automobile liability insurance is obvious upon inspection of the verdict thus returned. It reads (T. 41):

“We, the Jury in the above entitled action, find in favor of defendants Charles Gromer Dickinson

and Doris May Dickinson, and against the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, and on the Cross-Complaint of said Defendants and Cross-Claimants Charles Gromer Dickinson and Doris May Dickinson, as husband and wife, we find in their favor and against the Plaintiff and Cross-Defendant General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, A Corporation, in the sum of Five Thousand Two Hundred and Sixty-One Dollars and Sixty-Five Cents (\$5,261.65), with interest thereon at the rate of Seven Per Cent (7%) per annum from December 7, 1940 until paid.

Dated: December 29th, 1941.

Harry A. Armstrong,
Foreman."

The verdict above quoted was obviously binding on the trial court and the record will not permit it to be said that it ever ceased to be binding. It was therefore mandatory upon the court to enter a judgment enforcing the verdict. It would be illogical to say that a verdict ceases to be mandatory and a court is authorized to reject it because request is made to "adopt" it. And it would be equally illogical to say that by requesting a court to "adopt" a mandatory verdict in his favor a litigant estops himself from asserting that the verdict is mandatory.

Actions for declaratory relief are still in that stage where procedural uncertainties exist and where procedural informalities are to be expected. But as indicated by the decision of this court in *Pacific Indem.*

Co. v. McDonald, 107 F. 2d 446, it may not be supposed that reviewing courts will tolerate deprivation of the right of trial by jury because of such uncertainties or informalities.

2. THE JUDGMENT AGAINST THE DEFENDANTS DICKINSON IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. (Op. Bf. p. 17.)

Appellants repeat that "if the court is of opinion that the defendants Dickinson were denied the right of trial by jury the arguments under this subdivision will become moot". (Op. Bf. p. 18.)

The brief for appellee is committed to the theory that the law of California required Fereva the insured to give notice to the insurer within 20 days after the accident (Bf. App. pp. 11-15) and that the insurer may escape liability under the policy if Fereva did not give such notice within the 20 days (Bf. App. pp. 29-37).

That, however, is not the law.

Notice of an accident need not be given by the insured; it may be given by the injured person.

Bachman v. Independence Indemnity Co., 112 Cal. App. 465, 470;

Royal Indemnity Co. v. Morris, C.C.A.Cal. 1929, 37 F. 2d 90;

Metropolitan Casualty Ins. Co. of New York v. Colthurst, C.C.A.Cal. 1929, 36 F. 2d 559.

Notice of an accident given to a general agent of the insurer is sufficient even if the general agent does not notify the insurer.

L. F. Dowell Inc. v. United Pacific Casualty Ins. Co., 191 Wash. 666, 72 P. 2d 296;
Cal. Insurance Code, secs. 31, 35.

Failure to give notice within 20 days may be excused.

Burbank v. National Casualty Co., 43 Cal. App. 2d 773, 776-7;
Mercer Casualty Co. v. Lewis, 41 Cal. App. 2d 918, 922.

In the *Burbank* case, it was said, at page 777, in excusing a failure to give notice until three months after the accident:

“We are satisfied that the finding in respect to the excuse for failure to give any notice of the accident prior to the last mentioned date has ample support in the evidence. The rule in this situation is found in Huddy’s Encyclopaedia of Automobile Law, Volumes 13, 14, section 288, at page 358:

‘Under a policy requiring immediate notice to the Insurer of accident insured against, the conditions does not apply to every trivial occurrence, even though it may prove afterward to result in serious injury. If no apparent harm came from the mishap and there was no reasonable ground for believing at the time that bodily injury would follow there is no duty upon the insured to notify the insurer.’ ”

And in the *Mercer Casualty* case (41 Cal. App. 2d 918) it was said, at page 922:

“Criticism of the judgment is directed to the charges that respondent Lewis failed to comply with the terms of the policy relating to notice of the accident out of which the Collins judgment arose. The point is not available because appellant renounced the policy and denied liability thus waiving any claim that notice of the accident was insufficient or not within time. (Secs. 553, 554, Insurance Code; *Grant v. Sun Indemnity Co.*, 11 Cal. 2d 438, 440.)”

The appellee in the present case is wholly unmindful that the undisputed evidence in the record shows that within 20 days after the accident, the defendants Dickinson gave notice thereof to a general agent of the insurer. The record speaks as follows:

Testimony of Charles Gromer Dickinson.

“Q. I want to ask you, Mr. Dickinson, whether or not you went there to see Mr. L. K. Fereva . . . at his place of business shortly after the 25th day of February, 1940?

A. I did.

Q. * * * About when did you go to see Mr. Fereva at his place of business in Lincoln, Placer County?

A. I went down there sometime between five and twelve days after the accident.

Q. What did you have in Mr. Fereva's garage that caused you to go down there?

A. I had my car.

Q. Had the car been wrecked in the accident?

A. Yes, sir.

Q. When you went down to get the car, as you told the jury, in the period of between five and

twelve days after the 25th day of February, 1940, did you have a conversation with Mr. Fereva?

A. Yes, sir.

Q. Did you have a conversation with him regarding this accident?

A. I did.

Q. Will you please state what the conversation was? * * *

A. Well, *I went down to see Mr. Fereva. I told him my wife was very seriously injured, and asked him what he was going to do about it. He told me that the insurance company had my car tied up there, and was taking care of it, and everything was going to be taken care of.*" (T. 363-364.)

Testimony of Leon Karl Fereva.

"Q. When Mr. Dickinson came in there some week or ten days, or thereabouts, after the 25th of February, 1940, he said he had a conversation with you?

A. Yes, sir.

Q. What did he ask you at that time, and what did you say? * * *

A. He asked me what I intended to do with his car, and the doctor bills in Lincoln. *I told him I had nothing to do with it; it was turned over to the insurance company. Those were practically the words I told Mr. Dickinson.*" (T. 392.)

When it is remembered that Fereva was a general statutory agent of the insurer (T. 184-185) and vested with statutory authority to receive notice of an accident (Ins. Code, secs. 31, 35), the force of the quoted testimony is unmistakable. The notice thus given by the defendants Dickinson to the statutory agent of the

insurer amounted to full compliance with section 551 of the California Insurance Code respecting notice. And the thrust of the quoted testimony is even deeper. The quoted testimony discloses that the insurer through its general statutory agent represented and stated to the defendants Dickinson that the insurer had notice of the accident, that the insurer had notice of the loss, and that the insurer was taking care of the claims of loss. As the insurer set up the agency and conferred the agential authority, it is inevitable that responsibility therefor must rest with the insurer and not with innocent third persons.

It is true, as appellee points out (Bf. App. p. 11), that the law of California has declared that the rights of an injured person are coextensive with the rights of the insured under a policy of automobile liability insurance. But the law so declared does not exhaust all the law applicable to this case. The law so declared does not cover or consider a situation where, as here, the rights of injured persons must be justly determined and the person who occupied the status of insured also occupied the status of a general statutory agent of the insurer. In this respect the present case is apparently one of first impression. The problem here cannot be solved by applying the rule of coextensive rights, for it will be obvious to the court that doctrines of waiver and estoppel may be available to injured persons dealing with an agent of the insurer although not available to the insured.

Nor can the problem here be solved by the line of cases cited by appellee (Bf. App. pp. 24-25) involv-

ing only the rights of an insured against an insurer for which he was also agent. As pointed out in the opening brief (pp. 24-25) the solution of the problem here is found in the familiar maxim contained in section 3543 of the Civil Code of California, that "Where one of two innocent persons must suffer by the acts of a third, he, by whose negligence it happened, must be the sufferer".

To strike a balance at this point: 1. The undisputed evidence established that the injured person gave the insurer notice of the accident in strict compliance with section 551 of the California Insurance Code; 2. The undisputed evidence established that any delay in the presentation to the insurer of notice or proof of loss was waived, under section 554 of the same Code, by an act of the insurer; 3. The undisputed evidence established that the insurer was estopped from asserting, as against the injured person, any failure to present or any delay in the presentation of notice or proof of loss.

While it is plain from the law earlier cited that notice of the accident given by the injured person to Fereva the agent was sufficient even if the agent did not relay the notice to his superiors, the record also presents the aspect of prior notice to such superiors given by Fereva the agent and insured. This was discussed at pages 19 to 28 of the opening brief.

The appellee recognizes that a "Twofold obligation rested on Fereva as agent and insured" (Bf. App. p. 15), but its position throughout the brief is that questions of notice, waiver, and estoppel must be decided

on his status as insured and without reference to his status as agent. Appellants do not anticipate that this court will hold that where an insurance company creates such diversity of status it may freely hop back and forth between the branches thereof whenever the pursuit of nonliability is furthered. If, with the approval of his superiors, Fereva as agent gave notice to such superiors at certain times and places and in certain forms, then it is idle for appellee to contend that acts of the insurer did not cause Fereva as insured to give notice in the same way.

As the appellee questions the sufficiency of the evidence to show custom or usage in respect to such notice, the appellants therefore quote from the evidence.

Testimony of Leon Karl Fereva.

“Q. Now, commencing, let us say, in 1934, who did you report any accidents to, or any losses in connection with any policies issued to you or your clients?

A. Mr. Urquhart. * * *

Q. How did you report it to him?

A. Personally; sometimes by phone.

Q. Sometimes by phone and sometimes when he was in your place of business?

A. Yes.

Q. And after you reported any accident or loss to yourself or clients, what did he do?

A. Well, he turned it over to the authorities, I guess.

Q. What happened after that?

A. It was taken care of.

Q. Will you please tell the jury between 1935 and February 25, 1940, how many accidents you had, or your clients had in Lincoln or Placer County, that you reported to Mr. Urquhart?

A. My own personally? * * *

Q. Any of them.

A. Many of them.

Q. How many, Mr. Fereva?

A. A dozen or fifteen, the persons I had insured.

Q. No; just your own, that you carried insurance on, public liability and property damage.

A. You mean my own, personally?

Q. That is right.

A. Well, there have been several of them.

Q. Can you give us the names of any of them? I mean, any persons connected with them?

A. Yes; one of my salesmen, Mr. Smith; a prospective buyer by the name of Mr. Clark; Mrs. Christianson; at one time I had a partner by the name of Gianachi.

Q. *And these instances were accident, were they?*

A. *Yes.*

Q. *How did you report them to Mr. Urquhart?*

A. *Either verbally, or by telephone.*

Q. *After your report, were those accidents disposed of by the plaintiff company?*

A. *Yes, sir.*" (T. 322-323.)

The appellee ascribes significance to the failure of Fereva "to make denial or protest letters reserving company's rights". (Bf. App. p. 37.) If significance exists, it must be confined to the case against defendant Fereva. His failures or omissions in such respect

cannot be imputed to the defendants Dickinson. Moreover, self-serving letters scattered by an insurance company cannot convert a case of liability into one of nonliability. Under the terms of the policy, the insurer was bound to defend "any suit against the insured . . . even if such suit is groundless, false or fraudulent". (T. 124.) Under the law, the insurer was bound to defend the action instituted by the defendants Dickinson against the insured. The insurer, therefore, was bound by the results of that action.

Lamb v. Belt Casualty Co., 3 Cal. App. 2d 624, 630-31.

At page 29 of their opening brief these appellants cited the case of *Norton v. Central Surety & Ins. Co.*, 9 Cal. App. 2d 598, 601, 51 P. 2d 113, as reflecting the California law that the burden rested upon the insurer to prove affirmatively that it was substantially prejudiced by any delay in giving notice of the accident. The case is not mentioned in the brief for appellee. Reliance is there placed upon the case of *Purefoy v. Pacific Auto Indemnity Exchange*, 5 Cal. 2d 81, 53 P. 2d 155, which does not announce a rule contrary to the *Norton* case but merely holds that in the particular case the insurer affirmatively showed such prejudice.

This court will find in the present case that following the entry of judgment in the action instituted by the defendants Dickinson against the insured and the denial of a motion for new trial therein, the insurer wrote a letter to the insured under date of

January 28, 1941, there, for the first time, denying liability under its policy. (T. 171-172.) The letter recites, "This denial is based upon your failure to report the accident promptly and in accordance with the policy provisions". (T. 171.) The denial of liability was not placed upon the ground that the insurer had in any way been handicapped or prejudiced in the defense of the action. It is said in *Grant v. Sun Indemnity Co.*, 11 Cal. 2d 438, at page 440:

"It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

Clearly, the judgment against the defendants Dickinson is not supported by any substantial evidence.

3. THE CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE FINDINGS. (Op. Bf. p. 31.)

Under this subdivision in their opening brief, these appellants pointed out that (1) there was no finding that notice of the accident had not been given to the insurer in accordance with law, and (2) there was no finding that the insurer was prejudiced by default, delay, or defect in notice of the accident.

The brief for appellee does not assert the contrary. In earlier parts of this brief discussing the state of the evidence, demonstration was made that the evidence supported findings that notice had been given

in accordance with law and that the insurer was not prejudiced by default, delay, or defect in notice of the accident. The jury verdict for these appellants implied findings to that effect. But even if the matter had not been concluded by the jury verdict, it is apparent that in the absence of findings to the contrary on such issues the conclusions of law herein (T. 92) that plaintiff should have judgment and that defendants should take nothing, are not supported by the findings.

CONCLUSION.

For the several reasons stated in the opening brief and herein supplemented, it is therefore respectfully submitted that the judgment should be reversed.

Dated, Chico, California,
May 1, 1944.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
Attorneys for Appellants Dickinson.

No. 10,501

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS
MAY DICKINSON (his wife), WILLIAM
KEMP, and L. K. FEREVA, individu-
ally and doing business under the
firm name and style of "Fereva
Chevrolet Company",

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD.,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE
FILED BY LEAVE OF COURT.

MYRICK & DEERING AND SCOTT,
JAMES WALTER SCOTT,

Standard Oil Building, San Francisco,

Attorneys for Appellee.

FILED

MAY 25 1944

PAUL P. O'BRIEN
CL

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GENERAL ACCIDENT FIRE AND LIFE AS-
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Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE FILED BY LEAVE OF COURT.

Upon oral argument emphasis was placed by ap-
pellant upon the case of

Pacific Indemnity Co. v. McDonald, 107 Fed.
(2d) 446, 448,

in which the opinion was written by the Honorable
Judge Wilbur, and it is cited to the point that in an
action under the Federal Declaratory Judgment Act
trial by jury is a matter of right. Appellee has no
quarrel with the decision, but respectfully points out

that the holding of the court appears to be precisely what we are contending for, namely, as the opinion states:

“If the issues are raised in an action at law the right to a jury trial obtains and if raised in an action in equity it may be determined by the court without a jury, or the court may call to its aid a jury whose verdict is advisory.”

Where the issues are legal a jury may be demanded as a matter of right. But where the issues are equitable as well as legal the situation presented is an entirely different one. In such a case it appears to be well settled both in the Federal and California decisions, that the equitable issues are triable by the court without a jury, or by the court with a jury acting in an advisory capacity, and if there remain legal issues still to be determined they are triable by a jury.

This idea we submit is found in the Declaratory Judgment Act itself.

Judicial Code, Sec. 274-d, 28 U.S.C.A. Sec. 400.

There it is provided in subdivision (3):

“When a declaration of right * * * shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.”

Likewise the federal rules of civil procedure maintain the distinction between legal and equitable issues. See

Rule 38, subdivision b and c, and *Rule 39*.

To what extent the rules supersede the Practice Conformity Act may yet be considered an open question. Possibly the statement in

35 *Cor. Jur. Sec.*, p. 968, Sec. 99, is too sweeping. That authority states:

“The Practice Conformity Act, under which practice in civil actions at law in the federal courts was governed by the practice in the state courts, has been superseded by the Rules of Civil Procedure for District Courts, except as to matters expressly excepted.

Subject to the exceptions set forth in the Federal Rules of Civil Procedure, rule 81, 28 U.S.C.A. following section 723 c, as in the case of condemnation proceedings, see *infra* section 113, the Federal Rules of Civil Procedure, see section 96 *supra*, have superseded the Practice Conformity Act, 28 U.S.C.A. section 724, Rev. St. section 914, in so far as they are within the authority granted by congress. Thus no state law affecting practice or procedure can be given effect in the federal courts, unless the law relates to a matter expressly excepted from the rules.”

A broader statement and possibly a more accurate one is found in

Cyclopedia of Federal Procedure, 2nd Edition, as follows:

“Thus, a trial at common law consisted of a trial of the whole case as an indivisible entity; whereas, under the Rules of Civil Procedure, an action may now be split up into issues which may be tried separately, some with and some without a jury. It has been settled from the beginning that the Seventh Amendment applies to the fed-

eral courts only, but the constitutional and statutory right of trial by jury extends to the territories by virtue of statutes applicable to them, and also, with limitations, to some of the insular possessions of the United States. Since the right of trial by jury is constitutional there can be no conformity to state laws or practice in so far as that question is concerned. The question whether there is a right of jury trial when demanded is a federal question, and the doctrine of *Erie R. Co. v. Tompkins* does not apply so as to require the federal court to follow a state rule in determining whether a particular case is one to be tried by jury. But in the absence of any controlling statutory or constitutional provision or federal appellate decision, the federal court may follow the state law as to whether a particular issue in a case is triable by a jury or by the court. The right of trial by jury in the federal courts is such that an action cannot be maintained therein on a right of action which is legal in nature in the federal jurisprudence, given by state statute under which the action is not triable by jury.

The distinction between law and equity, abolished by the Rules of Civil Procedure, is a distinction in procedure and not a distinction between remedies; and the distinction between suits at law and suits in equity still remains for the purpose of determining whether a party is entitled to a trial by jury under the Seventh Amendment to the Constitution. Under Rule 38, the issues and not the form of the case determine the right to a jury trial, and if the basic issue is one which historically was for the jury, a jury demand should be respected. The right of trial by jury is preserved in suits at common law only.

There is no such right of trial in suits and proceedings in equity, and the fact that the subject matter of the suit involves that which is ordinarily triable by jury, does not affect the rule. Nor does the existence of incidental issues of fact of a legal nature in equity suits bring them within the constitutional guaranty. Conversely, where an action is essentially one at law, mere inclusion of an incidental prayer for equitable relief will not warrant the denial of a jury trial. However, a prayer for relief of an equitable nature may preclude a party from obtaining a trial by jury as of right. An equitable defense interposed in an action of a legal nature may raise equitable issues which are not to be tried by a jury as a matter of right, and the right to jury trial will be preserved only with respect to the legal issues, if any remain. The absolute right of trial by jury preserved by the Constitution is, of course, a matter entirely distinct from the discretionary power of a court to submit issues of an equitable nature to a jury. If the issues tendered by the pleadings are purely legal, the parties are entitled to a jury trial as of right when demanded in compliance with the provisions of Rule 38. If the issues are purely equitable or otherwise not triable of right by jury, the court has the undisputable right under Rule 39 to call a jury in an advisory capacity, either upon motion or of its own initiative, and to submit to the jury such issues as it sees fit, and in its discretion to accept or disregard the verdict; or, except in actions against the United States when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury

had been a matter of right. Both under the former and the present rules to send an equitable issue to a jury is within the discretion of the court to do or refuse, and it will refuse where it would be unjust and dilatory or where to do so would be useless because the question has already been determined by a master, and a contrary verdict could not be accepted. When a verdict has been reached on the issue tried, the court determines the equitable issues in the light of the verdict, but it is only advisory, and may be set aside or overruled."

Cyclopedia of Federal Procedure, 2nd Edition,
Vol. 7, Sec. 3293, pp. 477 to 481.

We refer also to

Hughes Federal Practice, Vol. 18, sections
23091, 23252-3 and 23255.

However, the rule for which we contend prevails in California as well as in the federal courts. The state decisions like the federal hold that an action for declaratory relief under the state statute is *sui generis*. As Chief Justice Gibson puts it in the case of

Gore v. Bingaman, 20 Cal. (2d) 118, 120,
124 Pac. (2d) 17:

"The question thus presented is whether this action is legal or equitable in character within the meaning of the constitutional provision. Where a statutory remedy is involved which was created long after the historic distinctions between actions at law and cases in equity were formulated, there is extreme difficulty in applying the sections of the Constitution basing the division of appellate jurisdiction between the Supreme Court and District Courts of Appeal upon that

distinction. We have recently referred to the unfortunate aspects of this constitutional requirement. (*De Garmo v. Goldman*, 19 Cal. (2d) 755, 767-769, 123 P. (2d) 1.) Similar considerations make it difficult to determine whether an action for declaratory relief is to be classified as legal or equitable for the purposes of appellate jurisdiction. The code provisions do not characterize the remedy as legal or equitable in this state (Code Civ. Proc., secs. 1060 et seq.), and while authorities agree that its historical sources are almost exclusively equitable, the remedy has been stated to be *sui generis* rather than strictly legal or equitable. (Borchard, *Declaratory Judgments* 2nd ed. 1941, pp. 238, 248, 399, 439.) Thus, it has been suggested that where it becomes important under constitutional provisions to classify a particular action for declaratory relief as legal or equitable, the determination should depend upon the issues involved in the particular action. (See 13 So. Cal. L. Rev. 170, et seq.; 28 Cal. L. Rev. 638.)"

We touched upon the federal rule in the brief for appellee, pages 6 to 10 inclusive. This rule is stated in

35 *Cor. Jur. Sec.*, p. 1131, Sec. 135 (2)

as follows:

"If there be both legal and equitable issues in the case, as where both legal and equitable issues are joined in a single action, as discussed *supra* section 129, the former are triable before a jury and the latter by the court. However, if an incidental legal issue is made part of an essentially equitable cause, there is no right to a jury trial of the legal issues if the court can dispose of all questions under its general equity powers."

And that the California rule is in substance the same appears from the following decisions:

Among the early California cases on the subject is *Bodley v. Ferguson*, 30 Cal. 511, at 519-520, wherein the answer contained both a legal and equitable defense, and it was held that the court might first try the equitable defense and refuse the plaintiff a jury trial, and if the facts warranted it the equitable relief prayed for. The result was a final disposition of the case. The court says:

“The answer, so far as it relies upon the deed of Mrs. Gilroy to the defendants’ grantors, states a purely legal defense, and if it stated no more, there could be no question of the plaintiff’s right to a jury trial. But the answer, over and beyond the legal title set up in the defendants, sets forth a parol contract to convey, with a view to the due execution of which the unacknowledged deed of Mrs. Gilroy was given. The terms of that contract are fully charged in the answer—and the entry and possession of the vendees under it—and the costly improvements made by them upon the land—and the subsequent purchase of the plaintiff, for a nominal sum, and with full notice of the defendants’ transactions on the land and of the contract under which they and their grantees entered, and the answer winds up with a prayer ‘that Bodley may be decreed to have no title in said premises or to any part thereof, but that as against him the same may be decreed to be the property of the defendants; that he may be decreed to hold the title and interest if any, which passed to him by said conveyance from said Montgomery, in trust for them; and that he may be decreed to convey, by a good and sufficient

deed, all said title, interest or claim to said defendants on demand, and that their title to said premises may be quieted, and that they have such other and equitable relief as may be agreeable to equity.' *That these allegations disclose an equitable defense, resting upon equitable ownership, is undeniable.* They were made upon the theory that the legal title was or might turn out to be in the plaintiff instead of the defendants, and they were intended to burden that title with a trust *in invitum* in the hands of the plaintiff. The relief asked for is equitable altogether. These facts not only demonstrate the quality of the answer, but show also that an appeal to the equity jurisdiction was a prevision, and not an afterthought, of the defendants or of the counsel by whom they were represented. *That the Court dealt with the case at the trial in the equity aspect of the answer is apparent from the circumstance that all the equitable issues were fully responded to,* and though the decree does not give all the equitable relief prayed for, nor all that the defendants were entitled to, still all of the relief given was equitable, and the plaintiff cannot complain on the score of the deficit. It is true that the Court has found that the legal title was in the defendants, as charged in the answer. But the finding does no harm, and for the reason that the charge did none. *The special defense was drawn with a law aspect and with an equity aspect. Perhaps the plaintiff might have compelled the defendants to elect on which of the two aspects they would go to trial, but he did not.* In the end the defendants voluntarily elected to take equitable relief, based upon the equitable facts found under the equity aspect

of the defense. Had the defendants elected in the end to take a common law judgment, based upon the finding that the deed referred to was an operative conveyance, the election would have related back to the trial, and the judgment would have been reversed on the ground that a trial by jury was claimed and improperly denied. The petition is denied."

In

Swasey v. Adair, 88 Cal. 179, at 180-81, 25 Pac. 1119,

it was held that the answer of the defendant did not sufficiently tender an equitable defense, but the rule upon which we rely is stated as follows:

"It has been stated by this court in many cases that when the defendant interposes equitable and legal defenses to the complaint, the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. (*Arguello v. Edinger*, 10 Cal. 160; *Estrada v. Murphy*, 19 Cal. 273; *Weber v. Marshall*, 19 Cal. 457; *Lestrade v. Barth*, 19 Cal. 671; *Martin v. Zellerbach*, 38 Cal. 319; 99 Am. Dec. 365; *Fish v. Benson*, 71 Cal. 434.) By making an equitable defense in such action the defendant does not, however, lose any right which he would otherwise have to have the issues of law tried by a jury, nor does the court, by virtue of being called upon, under the above rule, to first hear and dispose of the equitable defense, acquire the right to pass upon all the issues in the case without a jury. It may happen in many cases that the result of the trial of the equitable defense will obviate the necessity of a trial of the legal

issues. The trial may dispose of all of the issues in the case, or the equitable relief granted may be such as to prevent the trial of the issues at law, as was the case in *Bodley v. Ferguson*, 30 Cal. 511."

In

Estudillo v. Security Loan etc. Co., 158 Cal. 66,
at 71, 109 Pac. 884,

a case which also involved its final disposition without a jury, the court says of the procedure:

"The only error of law assigned in the notice was the refusal of the court to grant plaintiff's demand for a trial by jury. The complaint sought to set aside a foreclosure sale for fraud. The answer denied the allegations of fraud. At the trial the court announced that both legal and equitable issues were involved, and denied the demand for a jury trial so far as the equitable issues were concerned, declaring, at the same time, that the denial was without prejudice to the right of plaintiffs to have a trial by jury of the legal issues, *if there appeared to be any occasion for a trial of such issues after decision of the equitable issues*. It then proceeded to try, without a jury, the issues of fraud raised by the pleadings, and found in favor of defendants on these issues. We see no error in this. It is not disputed that an attack upon judicial proceedings for fraud presents a case appealing to the equity side of the court. Such case is not one which the parties are, of right, entitled to have tried by a jury. Where an action involves both legal and equitable issues, 'the former are ordinarily triable by the court and the latter by a jury.' (24 Cyc. 113.)

The court below proceeded in accordance with this rule.”

The rule is frequently considered by the District Courts of Appeal, as for example,

First National Bank v. Superior Court, 71 Cal.

App. 64, 69-70, 234 Pac. 420,

where the court says:

“It is possible that when, in an action at law, equitable matters are set up in an answer purely as a defense, that is, with no demand for affirmative relief, the controversy is not thereby changed from an action at law to a suit in equity (35 C. J. 174; and as bearing somewhat upon the *principle* announced, see *Lewis v. Tobias*, 10 Cal. 574; *Smith v. Sparrow*, 13 Cal. 596; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747). Where, however, the equitable matters alleged by the defendant are not merely defensive, but are matters of affirmative attack, the situation is quite different. It is said in a standard law publication that ‘if the answer contains not merely a technical defense but an independent equitable cause of action constituting a cross-demand in favor of defendant, the effect of which, if established, would extinguish plaintiff’s cause of action, the issue taken thereon is triable by the court and not of right by a jury’ (35 C. J. 175). This rule, apparently prevailing everywhere, has found adequate expression in the opinions of our own courts. It was said in a cause in which a cross-complaint praying equitable relief had been interposed in opposition to a complaint at law: ‘Being an action cognizable in equity and distinct from the legal action, it was the duty of the

court below to first determine the issues involved under the cross-complaint, for the reason that if the defendant succeeded on these issues it would defeat the right of plaintiffs to recover in their action at law, however perfect their legal right' (Fish v. Benson, 71 Cal. 428, 12 Pac. 454; and see, also, Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119). We have no doubt that under the conditions thus far considered petitioners are not entitled to a jury trial of the action, except, perhaps, under the case last cited, in the event that the equitable relief prayed by Stansbury should be denied, the right to a jury trial thereafter may exist upon the few issues arising from the meager denials in the amended answer of allegations of the complaint."

In

Crouser v. Boice, 51 Cal. App. (2d) 198, 204,
124 Pac. (2d) 329,

wherein legal and equitable issues were involved, and the right to a jury trial specifically considered, the court in holding that the order granting a new trial was not appealable as no right to a jury trial existed, says:

"We think this principle is determinative of the present case. Plaintiffs pleaded a purely equitable cause of action. So far as the pleadings, findings, conclusions and judgment are concerned plaintiffs believed they were entitled to such relief when they filed the action. Defendants pleaded that plaintiffs knew defendants did not have title. The court found that defendants in fact had title and had never informed plain-

tiffs to the contrary. At the very time judgment was entered the trial court must have believed that specific performance was possible, because it granted that relief. It is obvious, therefore, that the award of damages in the event defendants were unable or refused to perform was intended as a substitute for the relief of specific performance. This being so, such award, under fundamental principles, was made in the exercise of the equity jurisdiction of the court, and defendants were not entitled as of right to a jury trial on that issue. It inevitably follows that under section 963, subsection 2, Code of Civil Procedure, the order granting the new trial is not appealable."

Also in

Asamen v. Thompson, 55 Cal. App. (2d) 661, 672, 13 Pac. (2d) 841.

"It has been stated by the Supreme Court in many cases that when a defendant interposes equitable and legal defenses to the complaint, the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. (*Arguello v. Edinger*, 10 Cal. 150, 160; *Estrada v. Murphy*, 19 Cal. 248, 273; *Weber v. Marshall*, 19 Cal. 447, 457; *Lestrade v. Barth*, 19 Cal. 660, 671; *Martin v. Zellerbach*, 38 Cal. 300, 319, 99 Am. Dec. 365; *Fish v. Benson*, 71 Cal. 428, 12 P. 454.) It may happen in many cases that the result of the trial of an equitable defense will obviate the necessity of a trial of the legal issues, and the trial may even dispose of all of the issues in the case, or the equitable relief granted may

be such as to prevent the trial of the issues at law, but whenever the trial of the equitable defense does not have such result, and the issues at law remain undisposed of, these issues are to be tried in the same manner as though no equitable defense had been interposed."

For a recent expression of this rule by the California Supreme Court we refer to

Connell v. Bowes, 19 Cal. (2d) 870, 872, 123 Pac. (2d) 456,

where will be found a very interesting discussion by Chief Justice Gibson who points out that

"The practical problem presented by this rule is solved by the trial procedure outlined by Justice Henshaw in *Angus v. Craven*, 132 Cal. 691, 699, 64 Pac. 1091, approved by the Thomson case, whereby the equitable issues are tried first and then, if any legal issues remain, a jury may be called."

And we also refer to the decision written by Justice Curtis in

Pacific Western Oil Co. v. Bern Oil Co., 13 Cal. (2d) 60, 87 Pac. (2d) 1045,

where the discussion begins at page 66.

Probably an adequate definition of waiver for the purposes of this argument is that "waiver is the intentional relinquishment of a known right".

First National Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980;

Aaronson v. Frankfort Accident, etc. Co., 9 Cal. App. 473, 99 Pac. 537;

Coolidge v. Standard Accident, 114 Cal. App. 716, 300 Pac. 885.

A waiver as distinguished from an estoppel depends upon the existence of an intent to waive.

Orr v. Mutual Life Ins. Co., 64 Fed. (2d) 561;
Public Warehouses v. Fidelity & Deposit Co.,
 77 Fed. (2d) 831.

Estoppel is a different matter and especially equitable estoppel. This was referred to by Judge Welsh in his instructions to the jury, transcript page 406:

“The principle of estoppel may be defined as follows: Where a person tacitly encourages an act to be done he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induce the party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.”

The language of this instruction is taken from *Swain v. Seamens*, 9 Wall. 274, 19 Law. Ed. 554, and

Dickerson v. Colgrove, 100 U. S. 580, 25 Law. Ed. 618.

The instruction is responsive to the pleading of the defendants.

The difference between legal and equitable estoppel is pointed out in

31 *Cor. Jur. Sec.* p. 248, sec. 62,
 as follows:

“There is quite a distinction between the two classes of estoppel, legal and equitable. Legal estoppel, which is founded on deeds and judicial records, excludes evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppel, which is in pais, see *supra* section 59 c, is admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.”

Equitable estoppel has been considered by our California courts in various connections.

The definition is given in

10 *Cal. Jur.* p. 611, sec. 2,

as follows:

“An estoppel has been defined to be a bar ‘by which a man is precluded from alleging or denying a fact, in consequence of his own previous action, inaction, allegation, or denial which has led another to so conduct himself that, if the truth were established, that other would be damaged’,—an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterward drawn in question between the same parties or their privies. As stated by the supreme court of California, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this, that one may

be forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed, or a judgment, it would work an injustice and an injury to his adversary to permit him to do so.”

We also find a definition in

California Code of Civil Procedure, Sec. 1962, subd. 3,

as follows:

“Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.”

Estoppel *in pais* is of equitable cognizance.

10 *Cal. Jur.* p. 626, sec. 14;

Smith v. Anglo California Trust Co., 205 Cal. 496, 504, 271 Pac. 898.

Whether the issues are legal or equitable is of course to be determined from the pleadings.

People of Porto Rico v. Livingston, 47 Fed. (2d) 712.

We respectfully submit that in the case at bar the complaint of plaintiff may be held to present legal issues. It is also framed as one to avoid multiplicity of actions. How many actions must be attempted to be controlled in one suit to bring the matter within the cognizance of equity as a suit to avoid multiplicity is difficult to state. Here there were four possible actions. There were ten in

Jamerson v. Alliance Ins. Co. of Philadelphia,
87 Fed. (2d) 253.

Possibly the number may present a question addressed to the discretion of the trial court.

On filing their answer and amendment to answer defendants presented equitable issues and asked for affirmative relief. These issues were to be tried by the court and not by a jury. That they were addressed to the court and not to the jury was the attitude of defendants up to the time they submitted the proposed findings to the trial judge. We call this Honorable Court's attention to these proposed findings beginning at page 45 of the transcript, and ask that there be specially noted the proposed finding XXVI, at page 67, and the proposed judgment paragraph VI, pages 78-9.

As we have pointed out with reference to these equitable issues the defendant Fereva trailed along with the other defendants. The trial judge found against the defendants upon the issue of equitable estoppel. None of the defendants contended at any time that Fereva had given any notice whatever within 60 days except the alleged remark of Fereva to Urquhardt, a deaf man, found in the transcript pages 328-9, as follows:

"Bob, I want to report a little crackup I had down the highway the other morning with my tow car." I said, "I was called out in the morning to go out to pull a car out of the ditch, and while I was towing the car out of the ditch another car ran into the car we were towing out. There were several people injured; they were scratched and bruised, but nothing serious."

Urquhardt denies that any statement whatever was made to him by Fereva prior to 60 days after the happening of the accident.

The theory of the equitable defense was that by the course of conduct pursued by the plaintiff for some years Fereva was misled and caused to omit giving the notice required by condition 7 of the policy of insurance, and that hence the notice embodied in the alleged remark to the deaf man should be deemed a sufficient compliance with the term of the policy. The trial court found that this was not true; found that the alleged remark was not a compliance with condition 7; and further found that it was never made, that is, that Fereva gave no notice whatever prior to April 26, 1940 (see Findings, Transcript page 96), and that there was no estoppel.

We submit that in making its findings on the equitable issues the trial court completely disposed of all of the questions involved in the case; that there was no legal issue remaining to be determined by a jury; that in the entire record there is not the least bit of evidence showing or tending to show that the notice required by condition 7 of the policy was given to plaintiff prior to April 26, 1940. And to have referred any such question to the jury as a legal issue would have been ridiculous.

It is to be regretted that there was not a more careful compliance with the federal rules of civil procedure. To quote from

*(American) Lumbermen's Mutual Casualty Co.
v. Timms & Howard*, 108 Fed. (2d) 497,

"the case discloses procedural oddities". However, the judgment of the court is sound, fair and just and we respectfully submit that it should be affirmed.

Dated, San Francisco,

May 24, 1944.

Respectfully submitted,

MYRICK & DEERING AND SCOTT,

JAMES WALTER SCOTT,

Attorneys for Appellee.



No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEREVA, individually and doing busi-
ness under the firm name and style of
"Fereva Chevrolet Company",

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS DICKINSON
FILED BY LEAVE OF COURT.

J. OSCAR GOLDSTEIN,

BURTON J. GOLDSTEIN,

Chico, California,

Attorneys for Appellants Dickinson.

FILED

JUN - 5 1944

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CLERK

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Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS DICKINSON FILED BY LEAVE OF COURT.

The supplemental brief for appellee will not aid the court in solving the problem, Were the appellants Dickinson denied the right of trial by jury? Many authorities are cited in said brief on abstract principles of law. They may be accepted as correct statements as applied to the settings in which they were pronounced or to which they referred. They have no practical value as applied to the concrete setting disclosed by the present record.

The appellants Dickinson appear before the court as injured persons who recovered judgment against an insured to whom the appellee insurance company had issued a policy of automobile liability insurance. If, as plaintiffs, they had brought action on the policy against the insurance company, as defendant, their right to trial by jury of all the issues in such action would not be open to dispute. This would be true respecting issues of waiver or estoppel (*Dowling v. National Exch. Bank*, 145 U.S. 512, 12 S.Ct. 928, 930, 36 L.Ed 795; *California Packing Co. v. Lopez*, 207 Cal. 600, 603, 279 P. 664), issues of fraud (*Pacific Indemnity Co. v. McDonald*, C.C.A. Or. 1939, 107 F. 2d 446; *Ettelson v. Metropolitan Life Ins. Co.*, C.C.A. N.J. 1943, 137 F. 2d 62), and issues of release (*Jordan v. Guerra*, 23 A.C. 467, 144 P. 2d 349; *Magee v. Fasulis*, 57 Cal. App. 2d 275, 282-9, 134 P. 2d 815; *Gajanich v. Gregory*, 116 Cal. App. 622, 630, 3 P. 2d 389). In such action all issues in the case would have been submitted to a jury under appropriate instructions virtually paralleling the jury charge in the present record. (T. 400-419.)

Here, however, the insurance company took the initiative as plaintiff and filed an action for declaratory relief, and the injured persons came in as defendants and cross-claimants. The usual line-up of parties was reversed or inverted, but the same issues were litigated. Reduced to simple terms, the determinative question here is whether such reversing or inverting of parties deprived the injured persons of their right to trial by jury.

It is unnecessary to look further than the decision of this court in *Pacific Indemnity Co. v. McDonald*, 107 F. 2d 446, for a complete answer to the question. Quoting from pages 448 and 449:

“In the case at bar we have an appellant who has executed an insurance policy and who anticipates that an action will be brought upon that insurance policy by the person insured or by an injured person subrogated to his rights. The insurance company claims that it has a just defense to this action arising out of the conduct of the injured person. The issue of fraud and collusion for the purpose of obtaining a judgment by the injured person against the insured is in legal effect no more than an allegation of non-cooperation. In the absence of the insurance policy and its agreement for cooperation the insured would have a perfect right to confess judgment in favor of the injured person regardless of whether or not there was any legal liability for the injury. It follows from what we have said that we simply have a situation herein where a party who has issued a policy of insurance anticipates a suit thereon by the insured or one subrogated to his rights and to avoid delay brings the matter before the court by petition for declaratory relief. In such a proceeding, although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff, and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case we hold that there is an absolute right to a jury trial unless a jury has been waived. This is the view of the Circuit Court of Appeals for the Fourth Circuit (*Aetna Casualty & Surety Co. v. Quarles*, 92 F. 2d 321); and

the Circuit Court of Appeals for the Third Circuit (United States Fidelity & Guaranty Co. v. Koch, 102 F. 2d 288).

Decisions of courts, when the right to trial by jury has been involved in cases arising in different forms of action, point to the same conclusion. For instance, in a decision of the Supreme Court of California (*Donahue v. Meister*, 88 Cal. 121, 25 P. 1096, 1098) dealing with the right to a trial by jury in a statutory action to quiet title, the court made the following statement which is pertinent to the question involved in the case at bar:

‘If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit and thus inverting the parties, could not deprive defendant of his right to a jury.’
* * * .’’

The force of the case just cited is not impaired by any case cited in the supplemental brief for appellee. It is plain authority for a rule that shuffling the line-up of parties did not shuffle the right of trial by jury. The right existed as to all issues submitted to the jury under the instructions of the court. Preservation of the right therefore required that the verdict of the jury on all such issues be accepted by the trial court as binding. Deprivation of the right is manifested in the rejection of the verdict by the trial court.

The said brief makes no mention of the case of *Ettelson v. Metropolitan Life Ins. Co.*, C.C.A. N.J.

1943, 137 F. 2d 62 (certiorari denied by Supreme Court), cited at page 3 of the reply brief for these appellants. There the action was by the beneficiaries under a life insurance policy executed in New Jersey. The insurance company filed a counterclaim seeking cancellation and rescission of the policy on the ground of fraud. The law of New Jersey drew a distinction between "legal" and "equitable" fraud—the former being available as a defense to an action on the policy at law, and the latter being available only as the basis for affirmative relief in equity. The trial court ordered that prosecution of the action by plaintiffs be stayed until the counterclaim was heard. It was persuaded that the rule of *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118, 114 A.L.R. 1487, required such ruling. This order was reversed. Quoting from pages 65 and 66:

"Having concluded that the rule of *Erie R. Co. v. Tompkins* does not affect the procedure in the pending case, the final question is whether the defendant is entitled to have its counterclaim heard by the court, as though the judge was sitting in equity, before the present rules, or whether plaintiffs are entitled to have the issues heard by a jury. Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 39, 28 U.S.C.A. following section 723c. The same obtains when the right previously existed to have an issue tried by the

court. We must then inquire whether prior to the adoption of the Federal Rules of Civil Procedure a defense of 'equitable' fraud to an action for the proceeds of a life insurance policy was within the exclusive jurisdiction of equity. If it was, then there is no right to the jury trial demanded and defendant's contention that the matter raised in the counterclaim should be tried by the court must be sustained, not because of *Erie R. Co. v. Tompkins*, but because that is the federal court law on the subject.

We turn then to the federal decisions. The general rule pronounced by the Supreme Court is that in insurance cases, in the absence of special circumstances, which are not present here, 'fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available.' (*American Life Ins. Co. v. Stewart*, 1937, 300 U.S. 203, 212, 57 S.Ct. 377, 379, 81 L.Ed. 605, 111 A.L.R. 1268, and other cases cited.)

In one of these decisions, however, is the distinction between 'legal' and 'equitable fraud' expressly drawn. . . . We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent misstatement or nondisclosures has been tried by a jury in an action at law on the policy. (Cases cited.)

Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective 'legal' or 'equitable'. The issue on such a defense was tried by a jury

prior to the present rules; it continues to be so triable since."

These appellants find no occasion to pursue an inch by inch examination of the cases and texts contained in the supplemental brief for appellee. They are satisfied that the cases herein cited demonstrate that the verdict of the jury in their favor was binding on the trial court as to all issues submitted to the jury, and that when the trial court deprived appellants of that verdict and made and entered findings and judgment contrary to it, denial of the right of trial by jury was unmistakable.

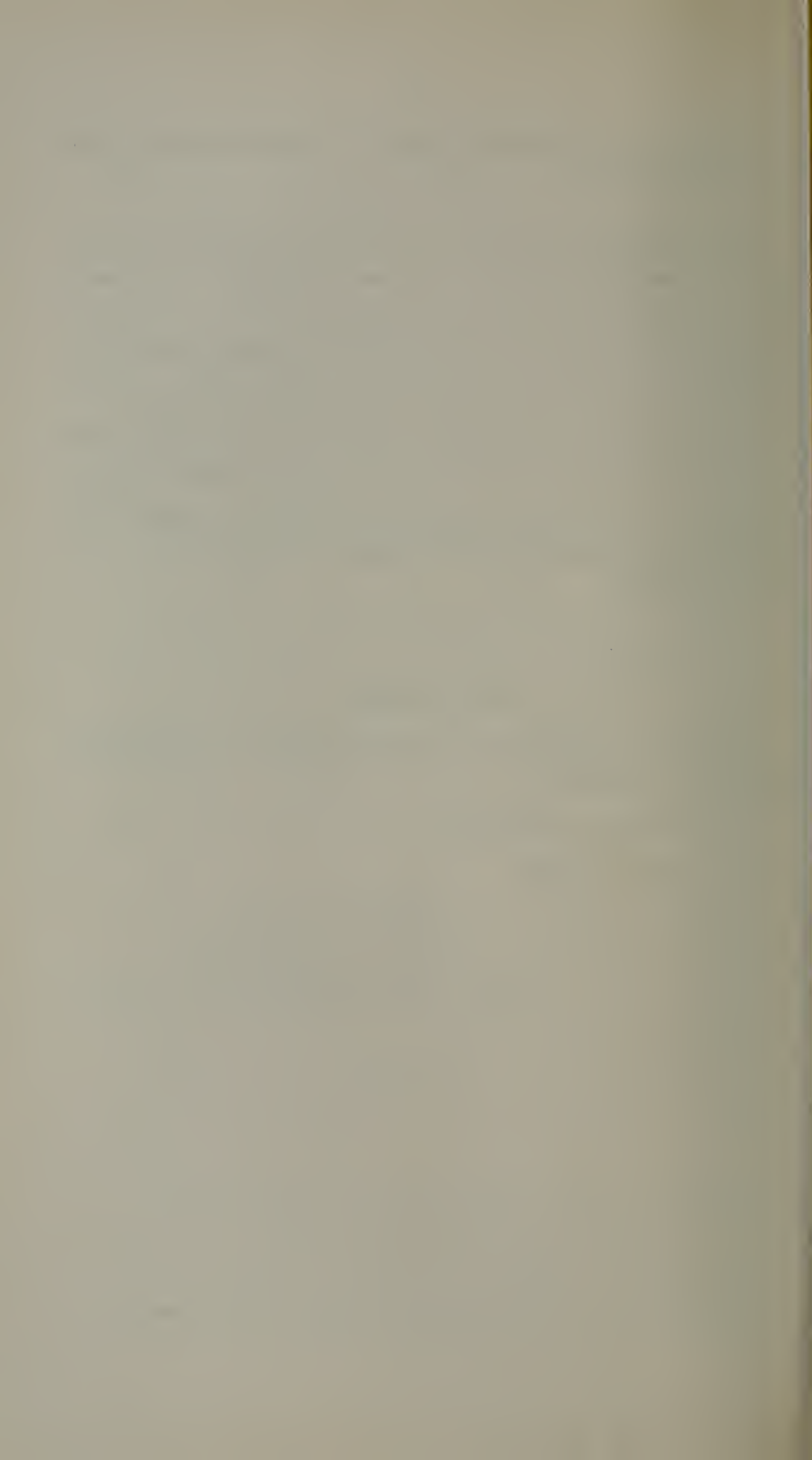
CONCLUSION.

It is again respectfully submitted that the judgment should be reversed.

Dated, Chico, California,

June 5, 1944.

J. OSCAR GOLDSTEIN,
BURTON J. GOLDSTEIN,
Attorneys for Appellants Dickinson.



No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
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Appellee.

PETITION OF APPELLEE FOR A REHEARING AND FOR
CLARIFICATION OR MODIFICATION OF OPINION
RENDERED HEREIN.

MYRICK & DEERING AND SCOTT,
JAMES WALTER SCOTT,

Standard Oil Building, San Francisco 4.

*Attorneys for Appellee
and Petitioner.*

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY
DICKINSON (his wife), WILLIAM KEMP, and
L. K. FEReva, individually and doing busi-
ness under the firm name and style of
“Fereva Chevrolet Company”,

Appellants,

VS.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

Appellee.

PETITION OF APPELLEE FOR A REHEARING AND FOR
CLARIFICATION OR MODIFICATION OF OPINION
RENDERED HEREIN.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Honorable Associate Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit:*

Your petitioner, General Accident Fire and Life Assurance Corporation, Ltd., appellee herein, respectfully petitions this Honorable Court for a rehearing and that this Honorable Court give and make its order

clarifying or modifying the opinion rendered herein on the 1st day of February, 1945, by adding thereto a statement that the decision of this Honorable Court is without prejudice to the right of appellee to move for a new trial after the entry of judgment, or to add a suitable statement to that effect.

Your petitioner respectfully states that as the decision now reads it is ambiguous, and leaves entirely open the question as to whether or not it strips appellee of the right to move for a new trial, which right is recognized by Rule 59 of the Rules of Civil Procedure for the District Courts of the United States, and by the California Code of Civil Procedure, Section 659. Under both the rules of court and the California statute the time for serving motion for new trial is ordinarily not later than 10 days after the entry of judgment, and petitioner assumes that it is not the intention of this Honorable Court to take this right away.

The trial court in this instance treated the action as one in equity, and the verdict of the jury as an advisory one. An advisory verdict is of course not binding upon the trial judge, and it may be disregarded and findings of fact and conclusions of law substituted in lieu thereof.

Idaho & Oregon Land Improvement Co. v. Bradbury, 132 U. S. 509, 33 L. Ed. 433;

Kohn v. McNulta, 147 U. S. 238, 37 L. Ed. 150.

This court by its decision holds that this procedure was improper and that the verdict was not an advisory one but a verdict at law.

Considering it in the light of the decision of this honorable court we respectfully submit that the appellee is entitled to have the verdict and judgment reviewed by the trial court on motion for new trial, and this is especially true in this particular case because the trial court has expressly found that testimony given upon the trial was false and untrue. The rule applicable is well stated by Circuit Judge Parker in

Aetna Casualty & Surety Co. v. Yeatts (4th Cir.), 122 Fed. (2d) 350, 354:

“The distinction between the rules to be followed in granting a new trial and directing a verdict were stated by us with some care in *Garrison v. United States*, 4 Cir., 62 F. (2d) 41, 42, from which we quoted with approval in the later case of *Roedegir v. Phillips*, 4 Cir., 85 F. (2d) 995, 996, as follows: ‘Where there is substantial evidence in support of plaintiff’s case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See *Felton v. Spiro* (6 Cir.), 78 F. 576. Verdict can be directed only where there is no substantial

evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. *Gunning v. Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice'."

As is stated by the Honorable Supreme Court in

Smith v. Royer, 181 Cal. 165, 171-2, 183 Pac. 660:

"In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. (*Dickey v. Davis*, 39 Cal. 565; *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715; *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337.)"

And the same rule is thus stated in

Green v. Soule, 145 Cal. 96, 102, 78 Pac. 337,

as follows:

"This evidence, though not very satisfactory, is sufficient to raise a conflict which cannot be decided by this court. If the court below was satisfied that the witnesses for defendant were entitled to equal credit with Cleary, it might well have ordered a new trial. But this court cannot pass upon the credibility of witnesses, and hence cannot interfere upon this ground. We frequently have cause to believe that the judges of the Superior

Court are too reluctant to exercise their power of granting a new trial for insufficiency of the evidence, and too much inclined to acquiesce in a verdict of the jury which does not meet with their own approval. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions, and it is well established by the decisions of this court. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. 'Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial.' (Irving v. Cunningham, 58 Cal. 309; Mason v. Austin, 46 Cal. 387; Hawkins v. Abbott, 40 Cal. 639; Bjorman v. Fort Bragg Co., 92 Cal. 500.) 'If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect.' (Dickey v. Davis, 39 Cal. 569.) 'There, although there may be what to us, judging from the cold record, seems a substantial conflict in the evidence, the court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, may, if he is dissatisfied with the verdict, and is of the opinion that it is clearly against

the weight of the evidence, set it aside and grant a new trial. The judge of the superior court is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend.' (Bates v. Howard, 105 Cal. 178.) Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where if submitted to him without a jury he might upon the evidence have made a different decision. He must be clearly satisfied that the verdict is wrong, otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

To the same effect may be cited a large number of California decisions of which we think it sufficient to refer this honorable court to the following:

Hirside v. Cochran, 109 Cal. App. 377, 293 Pac. 165;

Beall v. Erickson, 113 Cal. App. 36;

Lewis v. Southern California Edison Co., 116 Cal. App. 44, 2 Pac. (2d) 419;

Anderson v. Dahl, 121 Cal. App. 198, 8 Pac. (2d) 883;

Sisley v. Cole, 135 Cal. App. 4, 26 Pac. (2d) 528;

Chapman v. Goldberg, 140 Cal. App. 644, 35 Pac. (2d) 641;

Ohlson v. Frazier, 2 Cal. App. (2d) 708, 39 Pac. (2d) 429;

Francis v. Pacific Electric Ry. Co., 9 Cal. App. (2d) 278, 49 Pac. (2d) 313.

CALIFORNIA LAW CONTROLS IN THIS MATTER.

We submit that the law of the State of California controls in this matter since the decision in

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487;

Simkins Federal Practice, Section 1134, p. 821 ffg.

A state law consists of judicial decisions as well as statutes.

West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139, 132 A. L. R. 956.

The same rule must now be applied in state and federal courts.

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. Ed. 109.

APPELLEE'S OBJECTIONS AND EXCEPTIONS AT THE
TRIAL NOT YET PRESENTED.

In addition this petitioner respectfully urges that the record on appeal herein was prepared by the appellants with a view to presenting the points to which appellants took exception. There remain many questions as to the admissibility of evidence, conduct of the trial and instructions to the jury, which do not come within the scope of the printed record, and are nevertheless matters properly to be considered by the trial court when called upon to pass upon a motion for a new trial.

That confusion may be obviated and no erroneous impression be conveyed to the trial judge in this matter we respectfully and sincerely urge that a rehearing should be granted herein, and that the decision of this honorable court be clarified or modified.

Dated, San Francisco,
February 16, 1945.

Respectfully submitted,

MYRICK & DEERING AND SCOTT,
JAMES WALTER SCOTT,

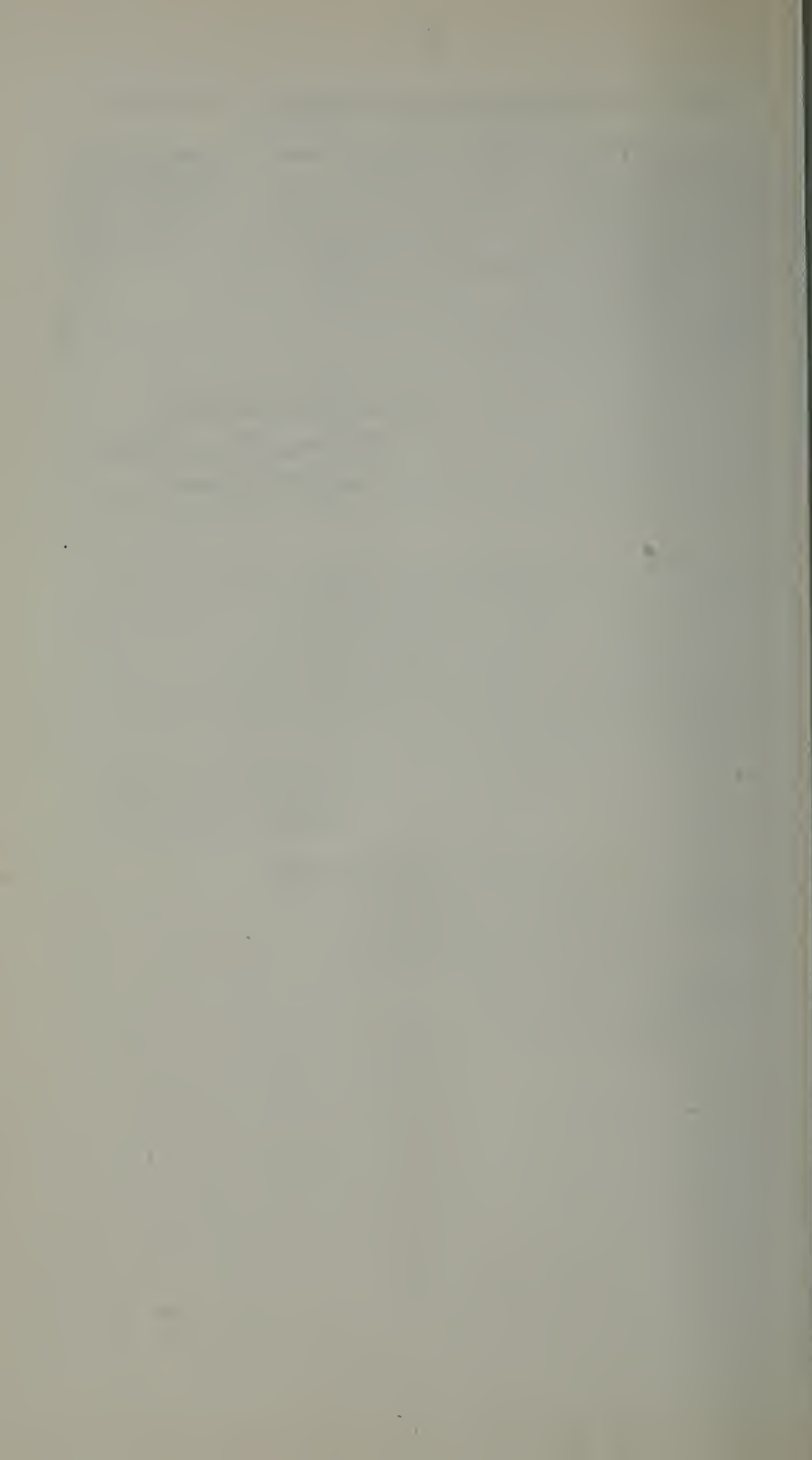
*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

I, James Walter Scott, attorney and counsellor for appellee, do hereby certify that in my judgment the foregoing petition for rehearing is well founded and the same is not interposed for delay.

Dated, San Francisco,
February 16, 1945.

JAMES WALTER SCOTT,
*Of Counsel for Appellee
and Petitioner.*



No. 10556

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED NATIONAL CORPORATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

OCT 7 - 1943

PAUL P. O'BRIEN,

CLERK

No. 10556

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED NATIONAL CORPORATION, a corporation,

Petitioner,

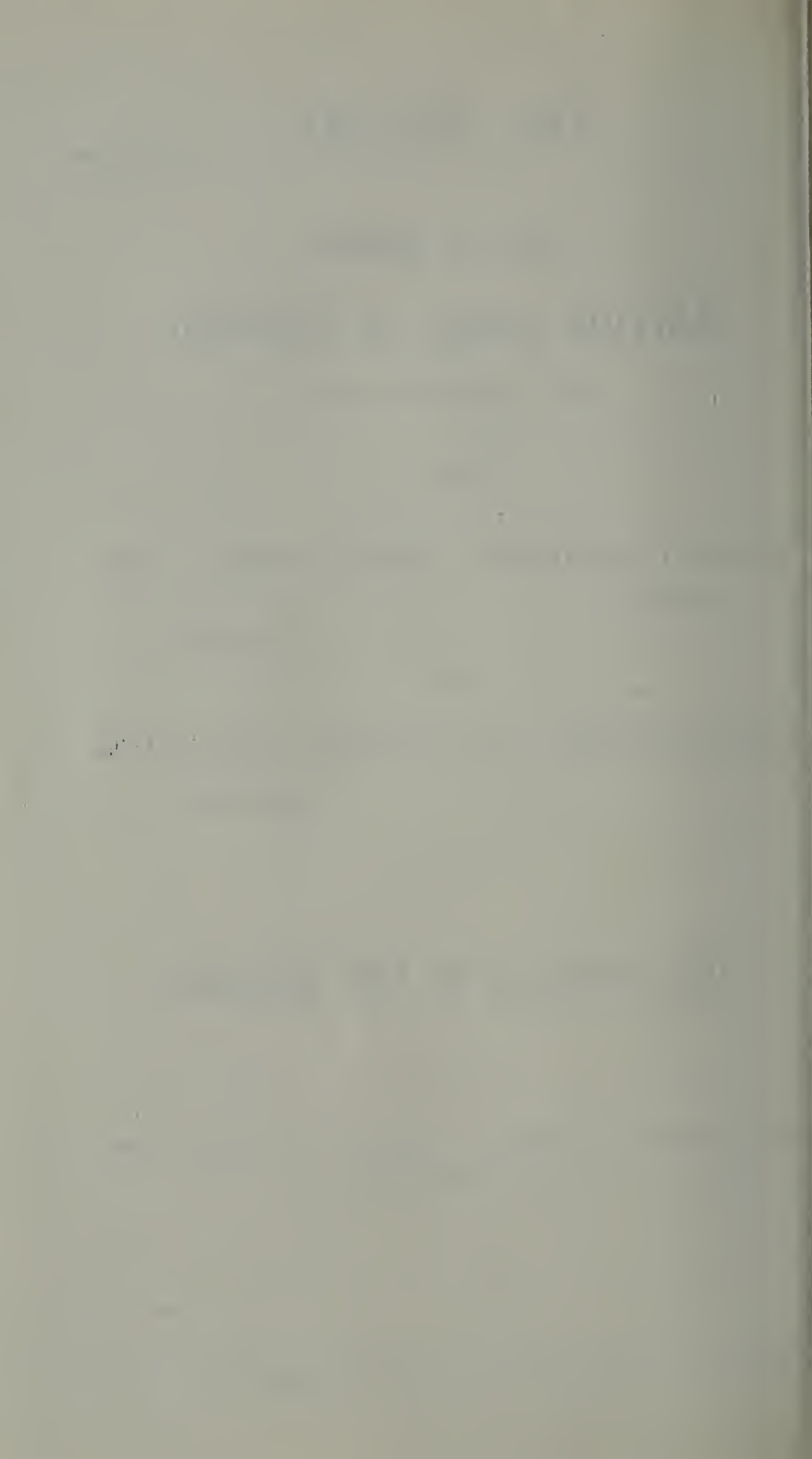
vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

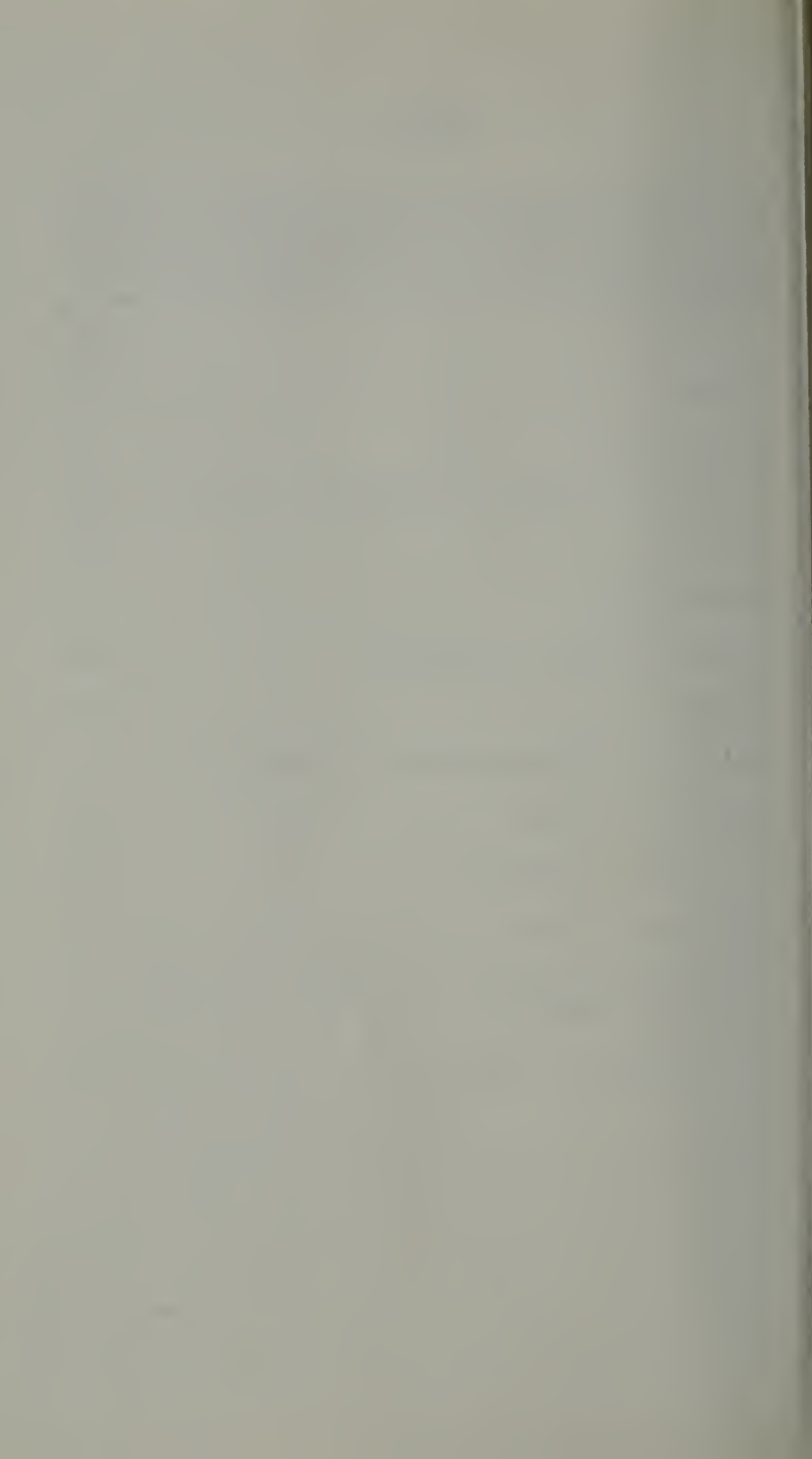
Upon Petition to Review a Decision of the Tax Court
of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

ROGER L. SHIDLER, Esq.

For Comm'r:

B. H. NEBLETT, Esq.,

C. R. MAXWELL, Esq.

Docket No. 110389

UNITED NATIONAL CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1942

Apr. 3—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 4—Copy of petition served on General Counsel.

May 27—Answer filed by General Counsel.

May 27—Request for hearing in Seattle, Wash. filed by General Counsel.

May 29—Notice issued placing proceeding on Seattle, Wash. calendar. Answer and request served.

Aug. 8—Hearing set Sept. 21, 1942 in Seattle, Wash.

Sept. 22—Hearing had before Marion J. Harron on the merits. Submitted.

25—Petitioner's brief due 11-9-42. Respondent's reply brief due Dec. 9, 1942. Petitioner's reply brief due 12-31-42.

Oct. 29—Transcript of hearing Sept. 22 and 25, 1942.

Nov. 9—Brief filed by taxpayer. 11-9-42 Copy served on General Counsel.

1943

Jan. 1—Motion for leave to Jan. 30, 1943 within which to file brief, filed by General Counsel.

Jan. 2—Motion for leave to Jan. 30, 1943 within which to file brief, Granted. Petitioner's reply brief due 2-20-43.

Jan. 30—Brief filed by General Counsel. Served 2-1-43.

Feb. 20—Reply brief filed by taxpayer. 2-20-43 Copy served.

June 15—Findings of fact and opinion rendered, Harron, Judge, Div. 13. Decision will be entered for the respondent. 6-26-43 Copy served.

June 25—Decision entered, Harron, Judge, Div. 13.

Aug. 16—Petition for review by U. S. Circuit Court of Appeals 9th Circuit, with assignments of error filed by taxpayer.

Aug. 17—Proof of service filed by taxpayer.

Aug. 16—Statement of points filed by taxpayer.

Aug. 30—Praecipe for record filed by taxpayer with proof of service thereon. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 110389

UNITED NATIONAL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

1. The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols IT:90D:JW, dated January 17, 1942, and as a basis of which petitioner alleges as follows:

2. The petitioner, United National Corporation, is a corporation organized and doing business under the laws of the State of Washington, with its principal place of business at Seattle, Washington.

3. The address of the petitioner is 501 Exchange Building, Seattle, Washington.

4. The return for the period involved was filed with the Collector for the District of Washington at Tacoma, Washington. The notice of deficiency, a copy of which is attached hereto, was mailed to the petitioner on January 17, 1942, as the petitioner believes.

5. The taxes in controversy are income taxes for the fiscal year ending June 30, 1939. The deficiency asserted is \$3,224.86. [2] Petitioner asserts that it is entitled to a refund of income taxes erroneously

and illegally collected for the fiscal year ending June 30, 1939, in the sum of \$1,170.27, which sum was paid to the Collector of Internal Revenue for the District of Washington subsequent to September 10, 1939, and within a period of less than three years from the date of filing this Petition. The total amount in controversy is \$4,395.13.

6. The determination of the tax, as set forth in said notice of deficiency, is based upon the following errors:

(a) That the distribution received from Murphey, Favre & Co. during the taxable year, in the sum of \$176,746.55, is essentially equivalent to the distribution of a taxable dividend and is to be treated as such, to the extent of the earnings and profits of that corporation accumulated after February 23, 1913.

(b) That the accumulated earnings and profits of Murphey, Favre & Co. as of September 9, 1938, were in the sum of \$108,509.80, or in any sum greater than \$88,120.80.

(c) That the earnings and profits of Murphey, Favre & Co. as of September 9, 1939, include \$20,389.00, representing increase of surplus resulting from the retirement of preferred stock of Murphey, Favre & Co. at a discount.

(d) In treating that part of the distribution which was properly chargeable to capital account as a distribution of earnings or profits.

7. The facts upon which petitioner relies are as follows:

(a) Prior to September 6, 1938, United National Corporation was the owner of all of the shares of

Murphey, Favre & Co., a [3] Washington corporation, engaged in the investment banking business in Spokane, Washington. Murphey, Favre & Co. had outstanding an authorized capital stock of \$100,000.00, consisting of 1,000 shares of common stock of the par value of \$100.00 per share. As of July 31, 1938, the capitalization of Murphey, Favre & Co., according to its books, was as follows:

Capital stock	\$100,000.00
Capital surplus	77,410.89
Earned surplus	58,251.17
<hr/>	
Total capital surplus and undivided profits	\$235,662.06
<hr/> <hr/>	

(b) Prior to September 6, 1938, certain of the officers of Murphey, Favre & Co. entered into negotiations for the purchase of Murphey, Favre & Co. They were unable to raise sufficient funds to purchase the stock of the corporation, on the basis of the capitalization of the company as it existed prior to September 6, 1938. Accordingly, it was agreed by the taxpayer and the prospective purchasers that Murphey, Favre & Co. would reduce its capital stock from 1,000 shares of common stock, of the par value of \$100.00 per share, to 250 shares of common stock, of the par value of \$100.00 per share, and that, upon the surrender of 750 shares of the common stock by the taxpayer, seventy-five per cent (75%) of all of the assets of Murphey, Favre & Co. would be delivered to the taxpayer, as the owner of said 750 shares.

8. Just prior to September 6, 1938, the taxpayer made an offer to Murphey, Favre & Co. to sur-

render for cancellation and retirement 750 shares of the common stock of Murphey, Favre & Co., upon payment to it of the par value of said shares, to-wit: [4] the sum of \$75,000.00, together with \$58,-058.17, being 75% of the paid-in surplus as of July 31, 1938, and \$43,688.38, being 75% of the earned surplus as of July 31, 1938, said sums being the respective amounts attributable to the 750 shares of the common stock to be retired pursuant to the proposed reduction of the capital stock of said corporation.

9. On September 6, 1938, the Board of Directors of Murphey, Favre & Co. adopted the following resolution:

“Now, Therefore, Be It Resolved by the Board of Directors of Murphey, Favre & Co., duly assembled at their special meeting on this 6th day of September, 1938, as follows:

Section 1. That the offer of United National Corporation to surrender 750 shares of common stock of this Corporation, out of the total of 1,000 shares of common stock held by it, for cancellation and retirement, is hereby accepted, and upon the going into effect (a) of the Articles of Amendment, amending Article III of the Articles of Incorporation of this Corporation, so as to provide that the authorized shares of stock of this Corporation shall consist of 250 shares of common stock of the par value of \$100.00 per share, and (b) the Articles of Reduction of Capital Stock of this Corporation, reducing the capital stock of this Corporation from the sum of \$100,000.00 to \$25,000.00, there shall be

paid to United National Corporation, as the holder of said 750 shares of common stock, upon the surrender of said shares to this Corporation for cancellation and retirement, the sum of \$75,000.00, together with \$58,058.17, being 75% of the paid-in surplus as of July 31, 1938, and \$43,688.38, being 75% of the earned surplus of the Corporation as of July 31, 1938, said sums being the respective amounts attributable to the 750 shares of common stock to be surrendered and retired pursuant to the proposed reduction of the capital stock of the Corporation. That as part of said transaction, this Corporation shall deliver to United National Corporation

(a) \$68,800.00 in face amount of Puget Sound Power & Light Company 5½% Notes, due 1940, at a valuation of \$59,326.92, and

(b) 129 shares of Prior Preference Stock of United National Corporation, at a valuation of \$774.00 [5] which property United National Corporation has agreed to accept at said valuations, as part payment of the sum of \$176,746.55, to be paid to it upon surrender of said 750 shares of common stock.

Section 2. The Treasurer of this Corporation is hereby authorized to make payment, in property and cash as aforesaid, to United National Corporation upon the surrender to this Corporation, for cancellation, said 750 shares of common stock of this Corporation, and proper entry shall be made by the Treasurer on the books of this Corporation, charging said

amounts, respectively, to the capital stock account, the paid-in-surplus account, and to the earned surplus account.”

10. Pursuant to a resolution adopted by the Board of Directors of Murphey, Favre & Co. on September 6, 1938, the capital stock of Murphey, Favre & Co. was reduced from 1,000 shares, of the par value of \$100.00 per share, to 250 shares, of the par value of \$100.00 per share. After Articles of Reduction of Capital Stock were filed with the Secretary of State of the State of Washington, distribution was made to United National Corporation, upon the surrender and redemption of said 750 shares of common stock of Murphey, Favre & Co., of a total amount of \$176,746.55, from the assets of Murphey, Favre & Co., representing 75% of (a) capital stock, (b) paid-in surplus, and (c) the earned surplus as shown on the books as of July 31, 1938. Said distribution was made on September 9, 1939.

The amounts received by the taxpayer from Murphey, Favre, & Co., upon the surrender of 750 shares of the common stock of Murphey, Favre & Co., were received in partial liquidation of Murphey, Favre & Co. Pursuant to section 115(c) of the Revenue Act of 1938, the total amount so received from Murphey, Favre & Co. should be applied as against the amount paid for the stock. The [6] cost of the 750 shares to United National Corporation was the sum of \$463,992.75.

11. In its income tax return for the year ending June 30, 1939, the taxpayer erroneously reported

as income \$43,688.38, which amount was part of the \$176,746.55 received from Murphey, Favre & Co. in the partial liquidation of Murphey, Favre & Co. during the taxable year ending June 30, 1939.

12. Prior to June 27, 1932, Murphey, Favre & Co. had outstanding shares of its preferred stock of the par value of \$100.00 per share. During the following fiscal years, respectively, Murphey, Favre & Co. retired shares of its preferred stock at a discount or premium as follows:

June 30, 1929	\$ (30.00) premium
June 30, 1931	19,588.90 discount
June 30, 1932	830.10 discount
<hr/>	
Net total	<u>\$20,389.00</u>

The debit or credit was charged or credited to capital surplus on the books of Murphey, Favre & Co. The retirement of said shares was a capital transaction and did not result in any increase or decrease in the earned surplus account of Murphey, Favre & Co. If it be held that all or any part of the \$20,389.00 increase in the surplus account was distributed to the taxpayer as part of the \$176,746.55 received by the taxpayer in connection with the retirement of Murphey, Favre & Co. stock, then said sum was a return of capital to the taxpayer and, as such, did not constitute taxable income.

13. Of the amount of \$176,746.55 distributed in partial liquidation of Murphey, Favre & Co., the sum of \$35,655.95 was [7] properly chargeable to capital account, and pursuant to the provisions of

Sub-section (c) of Section 115 of the Revenue Act of 1938, such sum of \$66,090.60 should not be considered a distribution of earnings or profits.

Wherefore, the petitioner prays that this Board may hear the proceedings and determine that there is no deficiency due from the petitioner for the fiscal year ending June 30, 1939, and that the petitioner is entitled to a refund in the sum of \$1,170.27, on account of taxes illegally collected for the fiscal year ending June 30, 1939.

ROGER L. SHIDLER

Counsel for Petitioner,
1800 Exchange Building,
Seattle, Washington.

State of Washington
County of King—ss.

Ben B. Ehrlichman, being first duly sworn, says: That he is the President of United National Corporation, the petitioner named in the foregoing Petition, and as such is duly authorized to verify the foregoing Petition and is familiar with the statements therein contained, and that the facts therein stated are true.

BEN B. EHRLICHMAN

Subscribed and sworn to before me this 28th day of March, 1942.

[Seal]

HOWARD M. NIMMONS

Notary Public in and for the State of Washington,
residing at Seattle, Washington. [8]

Treasury Department
Internal Revenue Service
Seattle, Washington
January 17, 1942

Office of
Int. Rev. Agent
in charge
Seattle Division
350 Federal Office Bldg.
IT:90D:JW

United National Corporation,
501 Exchange Building,
Seattle, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended June 30, 1939, discloses a deficiency of \$3,224.86 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle, Washington, for the attention of IT:90D:JW. The signing and filing of this form will expedite the clos-

ing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner

By GEO. C. EARLEY

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver.

JW:rmt [9]

STATEMENT

IT:90D:JW

United National Corporation

501 Exchange Building

Seattle, Washington

Tax Liability for the Taxable Year Ended

June 30, 1939

	Liability	Assessed	Deficiency
Income Tax	\$4,535.31	\$1,310.45	\$3,224.86

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated March 3, 1941; to your protest dated May 21, 1941; and to the statements made at the conferences held on June 16 and July 7, 1941, and September 15 and October 8, 1941.

A copy of this letter and statement has been mailed to your representative, Mr. Roger L. Shidler, 1800 Exchange Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by amended return.....	\$ 51,164.80
Unallowable deductions and additional income:	
(a) Dividends from Murphey, Favre & Co.,	
understated	64,821.42
Net income adjusted	\$115,986.22

[10]

Explanation of Adjustments

(a) It is held that the amount of \$176,746.55 distributed to you in cash and property during the taxable year by Murphey, Favre & Co., Spokane, Washington, is essentially equivalent to the distribution of a taxable dividend and is to be treated as such to the extent of the earnings and profits of that corporation accumulated after February 28, 1913.

It is further held that the amount of such accumulated earnings and profits to September 9, 1938, the date of the distribution, was \$108,509.80, as follows:

Amount accumulated to June 30, 1938.....	\$109,515.17
Less:	
Reduction from July 1 to September 9, 1938.....	1,005.37
Balance	\$108,509.80

There was reported on your return the sum of \$43,688.38 as the amount of dividends taxable, from this source or an understatement of \$64,821.42.

Schedules disclosing the accumulation of the amount of \$109,515.17 from March 1, 1913, to June 30, 1938, are attached as Exhibit A, and Schedules A-1 to A-6, inclusive; accumulation of paid-in surplus, as Exhibit B and a corrected balance sheet as at June 30, 1938, as Exhibit C, are attached hereto.

Included in the amount of \$109,515.17 are items totalling \$20,389.00, representing increase of surplus resulting from the retirement of preferred stock at a discount. Since all of the preferred stock was retired it is held that the distribution of this amount to you as a holder of common stock of taxable.

Your contention that earnings and profits accumulated as at June 30, 1938, should be reduced by book losses for July and August, 1938, has been conceded.

[Endorsed]: U.S.B.T.A. Filed Apr. 3, 1942.

[11]

[Title of Board and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition.

5. Admits that the taxes in controversy are income taxes for the fiscal year ending June 30, 1939; that the deficiency asserted is \$3,224.86; and that petitioner asserts that it is entitled to a refund of income taxes for the fiscal year ending June 30, 1939, in the sum of \$1,170.27. For lack of sufficient information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining material allegations contained in paragraph 5 of the petition. [12]

6. Denies that he erred in his determination of the deficiency as shown by the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in subparagraphs (a) to (d), inclusive, of paragraph 6 of the petition.

7(a). Admits the allegations contained in the first and second sentences of subparagraph (a) of paragraph 7 of the petition. For lack of sufficient information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in said subparagraph (a) of paragraph 7 of the petition.

(b). Admits the allegations contained in subparagraph (b) of paragraph 7 of the petition, except that it is denied that it was agreed between

the taxpayer and the prospective purchasers that seventy-five per cent (75%) of all the assets of Murphey, Favre & Co. would be delivered to the taxpayer.

8. Admits that prior to September 6, 1938, the taxpayer made an offer to Murphey, Favre & Co. to surrender for cancellation and retirement 750 shares of the common stock of Murphey, Favre & Co. For lack of sufficient information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph 8 of the petition.

9. Admits the allegations contained in paragraph 9 of the petition.

10. Admits that pursuant to a resolution adopted by the Board of Directors of Murphey, Favre & Co. on September 6, 1938, the capital stock of Murphey, Favre & Co. was reduced from 1,000 shares, of the par value of \$100.00 per share, to 250 shares, of the par value of \$100.00 per share; [13] that distribution was made to the United National Corporation, upon the surrender and redemption of said 750 shares of common stock of Murphey, Favre & Co., of a total amount of \$176,746.55, from the assets of Murphey, Favre & Co., and that said distribution was made on or about September 9, 1939. Denies the remaining material allegations contained in paragraph 10 of the petition.

11. Admits that in its income tax return for the year ending June 30, 1939, the taxpayer reported as income \$43,688.38, which amount was part of the \$176,746.55, received from Murphey, Favre & Co. during the taxable year ending June 30, 1939.

Denies the remaining allegations contained in paragraph 11 of the petition.

12. Admits that prior to June 27, 1932, Murphey, Favre & Co. had outstanding shares of its preferred stock of the par value of \$100.00 per share, and that during the fiscal years ended June 30, 1929, June 30, 1931, and June 30, 1932, Murphey, Favre & Co. retired said shares of its preferred stock at a discount or premium in the amounts as alleged in paragraph 12 of the petition. For lack of sufficient information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph 12 of the petition.

13. Denies the allegations contained in paragraph 13 of the petition.

14. Denies generally and specifically each and every material allegation contained in the petition herein, not hereinbefore specifically admitted, qualified, or denied. [14]

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

(Signed) J. P. WENCHEL

J.H.P.

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

Alva C. Baird,

Division Counsel.

John H. Pigg,

Special Attorney,

Bureau of Internal Revenue.

JHP: [Illegible] 5-18-42

[Endorsed]: U.S.B.T.A. Filed May 27, 1942.

[15]

The Tax Court of the United States

Docket No. 110389

UNITED NATIONAL CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

Promulgated June 15, 1943

Redemption of common stock in X corporation, which was owned by petitioner, held to be essentially equivalent to the distribution of a taxable dividend within the provisions of section 115 (g) of the Revenue Act of 1938; held, further, that the amount of the earnings or profits of the corporation which made the distribution included the amount of a gain realized in earlier years upon the redemption of all of the preferred stock.

Roger L. Shidler, Esq.,
for the petitioner,
B. H. Neblett, Esq., and
C. R. Maxwell, Esq.,
for the respondent.

The Commissioner determined a deficiency in income tax for the fiscal year ended June 30, 1939, in the sum of \$3,224.86.

Petitioner contends that there is no deficiency and that it has overpaid tax in the sum of \$1,170.27.

The principal issue is whether certain payments received in 1938 from a corporation in which petitioner was the sole stockholder for shares of its stock were essentially equivalent to the distribution of a taxable dividend under section 115 (g) of the Revenue Act of 1938.

Findings of Fact

Issue 1.—Petitioner was organized on July 10, 1928, under the laws of the State of Washington. Its principal office is at Seattle, Washington. It filed its return with the collector for the district of Washington. Petitioner keeps its books and files its returns on the accrual basis. Petitioner is a holding company.

During the taxable year, up to September of 1938, petitioner owned all of the stock of Murphey, Favre & Co., consisting of 1,000 shares. The origin of Murphey, Favre & Co. is as follows:

Alonzo M. Murphey, John M. Murphey, and F. D. Gibbs organized a corporation in 1897, known as the Real Estate Trust Co., with 50 shares of \$20

par value stock, all of which was subscribed and paid for in cash by the above persons. In 1912 a corporation, which is called [16] X Co. for convenience, was organized. Its stockholders were Alonzo M. Murphey, Eugene B. Favre, and two others, minor stockholders. Shortly after its organization X Co. acquired all of the assets of Real Estate Trust Co. in exchange for 250 shares of the stock of X Co. However, the stock of X Co. went to the stockholders of the Real Estate Trust Co. In 1914 the Real Estate Trust Co.'s stockholders amended its articles of incorporation so as to change its name to Murphey, Favre & Co., and to increase its capital stock from 50 shares of a par value of \$20 to 500 shares of a par value of \$100. The original 50 shares of \$20 par value were surrendered and canceled. In effect, in 1914, the stockholders of the Real Estate Trust Co. surrendered their stock in that company in exchange for the stock in X Co. which they had received in 1912. Alonzo Murphey was the chief stockholder of the Real Estate Trust Co., owning 48 of the original 50 shares. He held most of the 250 shares of X Co. which had been given in 1912 in exchange for the assets of the Real Estate Trust Co. When, in 1914, the Real Estate Trust Co. was reorganized under the name of Murphey, Favre & Co., it had no assets. It acquired all of the assets of X Co. in exchange for all of its new stock, 500 shares of a par value of \$100. The assets of X Co. were given a value of \$52,500. Accordingly, as of May 1914, Murphey, Favre & Co. had capital of \$50,000

and a paid-in surplus of \$2,500, all of which was represented by assets acquired in exchange for 500 shares of its stock. The X Co. distributed the 500 shares of Murphey, Favre & Co. stock to its own stockholders, Alonzo M. Murphey and Eugene B. Favre, receiving 249 shares each, respectively.

Murphey, Favre & Co. is referred to hereinafter as the Murphey Co.

On December 13, 1921, the Murphey Co. increased its capital stock from \$50,000, divided into 500 shares of common stock at a par value of \$100 per share, to \$100,000, divided into 1,000 shares of common stock of the par value of \$100 per share. The Murphey Co. had net assets at such time as shown by its balance sheet in the sum of \$123,700, consisting (prior to said increase) of unimpaired capital stock in the sum of \$50,000 and of surplus and undivided profits in the sum of \$73,700. The additional 500 shares of common stock of the par value of \$100 per share were issued to the stockholders of the Murphey Co. as a stock dividend at the rate of one share thereof for each share of the old common stock. The said sum of \$50,000 was transferred from surplus and undivided profits to capital stock account in full payment of the 500 additional shares distributed as a stock dividend.

On March 2, 1927, the capital stock of the Murphey Co. was increased from \$100,000, divided into 1,000 shares of common stock of the par value of \$100 per share, to \$190,000, divided into 1,500 shares of common stock of the par value of \$100 per share and 400 shares of pre [17] ferred stock

of the par value of \$100 per share. The Murphey Co. had net assets at such time as shown by its books of account in the sum of \$134,244.80, consisting (prior to said increase) of unimpaired capital stock in the sum of \$100,000 and surplus and undivided profits in the sum of \$34,244.80. The 400 shares of preferred stock were purchased by a stockholder of the Murphey Co. Of the 500 shares of common stock authorized to be issued, 250 shares were issued ratably as a stock dividend to the stockholders of the Murphey Co. in the ratio of one share of common stock for each four shares of the old common stock. The sum of \$25,000 was charged against the then existing surplus and undivided profits of the Murphey Co. and transferred to the capital stock account of the Murphey Co., in full payment of the total par value of \$25,000 of said 250 new shares of common stock so issued as a stock dividend. The stockholders of the Murphey Co. at the time purchased from it for cash the balance of 250 shares of said additional 500 shares of common stock, at the price of \$100 per share, and all of the additional 500 shares of common stock were accordingly issued as nonassessable stock of the Murphey Co.

On August 9, 1928, the capital stock of the Murphey Co. was further increased from \$190,000, divided into 1,500 shares of common stock of a par value of \$100 per share and 400 shares of preferred stock of a par value of \$100 per share, to \$450,000, divided into 2,000 shares of common stock of the par

value of \$100 per share and 2,500 shares of preferred stock of the par value of \$100 per share. The additional 500 shares of common stock were sold at the cash price of \$100 per share. There were issued 2,335 shares of the preferred stock for a total consideration of \$233,500.

Between September 1, 1928, and June 27, 1932, all of the issued preferred stock of the Murphey Co. was retired and canceled.

In December 1928 the petitioner acquired 2,000 shares of common stock of the Murphey Co. by purchase from the then stockholders, by delivering and transferring to them 21,333 shares of its own participating preference stock. On June 4, 1932, the 2,000 shares of common stock were reduced to 1,000 shares, the certificates representing 2,000 shares were surrendered, and new certificates for 1,000 shares were issued by the Murphey Co. No distribution of assets was made to shareholders in connection with the exchange. On June 27, 1932, the total outstanding stock of the Murphey Co. comprised the above 1,000 shares, and petitioner was the sole stockholder.

Prior to September 6, 1938, some of the officers of the Murphey Co., acting as individuals, entered into negotiations with petitioner for the purchase of all of the 1,000 shares of stock. They were unable to raise sufficient funds to purchase the entire block of stock on the basis of the capitalization of the Murphey Co. at that time. [18]

At a special meeting of the stockholders of the Murphey Co., which was held on September 6, 1938,

a resolution was adopted to amend the articles of incorporation so that the authorized capital stock should be 250 shares of common stock of the par value of \$100. This amendment of the charter of the Murphey Co. was for the purpose of reducing the capital stock from 1,000 shares to 250 shares, and it was contemplated that 750 shares of the total 1,000 shares outstanding would be surrendered for cancellation and retirement.

On September 6, 1938, at a special meeting of the directors of the Murphey Co., resolutions were adopted and approved, amending the charter to reduce the authorized capital stock to 250 shares of common stock. Also at this meeting a resolution was adopted which provided as follows:

That the offer of United National Corporation to surrender 750 shares of common stock of this Corporation [Murphey Co.], out of the total of 1,000 shares of common stock held by it, for cancellation and retirement, is hereby accepted, and * * * there shall be paid to United National Corporation, as the holder of said 750 shares of common stock, upon the surrender of said shares to this Corporation for cancellation and retirement, the sum of \$75,000.00, together with \$58,058.17, being 75% of the paid-in surplus as of July 31, 1938, and \$43, 688.38, being 75% of the earned surplus of the Corporation as of July 31, 1938. said sums being the respective amounts attributable to the 750 shares of common stock to be surrendered and retired pursuant to the proposed reduction of the capital stock

of the Corporation. That as part of said transaction, this Corporation shall deliver to United National Corporation

(a) \$68,000.00 in face amount of Puget Sound Power & Light Company 5½% Notes, due 1940, at a valuation of \$59,326.92, and

(b) 129 shares of Prior Preference Stock of United National Corporation, at a valuation of \$774.00

which property United National Corporation has agreed to accept at said valuations, as part payment of the sum of \$176,746.25, to be paid to it upon surrender of said 750 shares of common stock.

The Treasurer of this Corporation is hereby authorized to make payment, in property and cash as aforesaid, to United National Corporation upon the surrender to this Corporation, for cancellation, said 750 shares of common stock of this Corporation, and proper entry shall be made by the Treasurer on the books of this Corporation, charging said amounts, respectively, to the capital stock account, the paid-in surplus account, and to the earned surplus account.

The offer of petitioner referred to above had been authorized at the meeting of the officers of the directors of petitioner which was held on August 31, 1938, at which meeting a resolution was adopted authorizing petitioner's treasurer to deliver 750 shares of common stock of the Murphey Co. to the treasurer of the Murphey Co. for cancellation and retirement upon the going into effect of the pro-

posed amendment to the articles of incorporation of the Murphey Co. It was recited in the minutes of the meeting held August 31, 1938, that it was proposed to surrender for cancellation and retirement 750 shares of the common [19] stock of the Murphey Co. and that there should be paid to petitioner "the sum of \$75,000, being 75 per cent of the capital stock of the Corporation, together with \$58,058.17, being 75 per cent of its paid-in surplus as of July 31, 1938, and \$43,688.38, being 75 per cent of its earned surplus as of July 31, 1938," and that it was also proposed that petitioner should accept from the Murphey Co., as part payment of the above sums which would become due to it, Puget Sound 5½ percent notes, at a valuation of \$59,326.92, and 129 shares of petitioner's own prior preference stock.

On September 6, 1938, the capital stock of the Murphey Co. was reduced from 1,000 shares to 250 shares of the same par value of \$100 per share. After articles of reduction of capital stock were filed with the Secretary of State of the State of Washington, distribution was made to petitioner upon the *surrender* and redemption of 750 shares of common stock of the Murphey Co. of a total amount of \$176,746.55 from the assets of the Murphey Co., of which \$116,645.63 was paid in cash and \$60,100.92 was paid in securities of an agreed value of that amount.

After the redemption was effected and on September 16, 1938, the petitioner sold the remaining 250 shares to certain of the officers of the Murphey

Co. for \$51,835.16. Prior to this, however, on September 15, 1938, petitioner entered into a contract with the Murphey Co. whereby petitioner agreed to advise the Murphey Co. in the conduct of its business for a percentage of its annual profits but not to exceed the sum of \$75,000 over a period of 10 years.

From March 1, 1913, to June 30, 1938, the taxable and nontaxable income of the Murphey Co., as shown by its income tax returns, aggregated \$608,153.50; net additional taxable income resulting from audit reviews of returns aggregated \$1,748.09; and additional nontaxable profit because of retirement of preferred stock at a discount amounted to \$20,389; total \$630,290.59. During this period the Murphey Co. paid cash dividends aggregating \$416,192.56; paid income taxes aggregating \$86,612.21; paid insurance premiums aggregating \$10,856.47; made donations of \$7,114.18; total \$520,775.42. The earnings and profits accumulated by the Murphey Co. during this period were \$109,515.17, adjusted for certain items of \$1,005.37, as agreed to by the parties, to \$108,509.80.

As of June 30, 1938, the paid-in capital, the paid-in surplus, and the earned surplus of the Murphey Co., were as follows:

Capital paid-in for stock	\$125,000.00
Paid-in surplus—cash paid in	47,400.00
Earned surplus, adjusted	108,509.80

There was no intention on the part of the shareholders and officers of the Murphey Co. to curtail the company's business operations at the time of

the distribution of September 1938 upon the redemption of 750 [20] shares of common stock. In fact, the Murphey Co. intended to do a larger business in the future than it had in the past. The Murphey Co. had never had, at any time, the intention of liquidating its business or winding up its affairs.

The purpose of reducing the common stock of the Murphey Co., from 1,000 shares to 250 shares was to accommodate its sole stockholder, petitioner, which desired to sell all of its holdings in the Murphey Co., and to distribute a portion of the accumulated earnings and profits to its sole stockholder. The distribution during 1939 by the Murphey Co., upon cancellation of 750 shares of its stock, was essentially equivalent to the distribution of a taxable dividend within the meaning of section 115 (g) of the Revenue Act of 1938.

Issue 2.—On June 30, 1929, the Murphey Co. redeemed shares of its preferred stock at a premium over par value in the total amount of \$30. On June 30, 1931, the Murphey Co. redeemed shares of its preferred stock at a discount from the par value of the shares in a total amount of \$19,558.90. On June 30, 1932, the Murphey Co. redeemed shares of its preferred stock at a discount from the par value of the shares in the total amount of \$830.10. All of the above redemptions were at a net discount of \$20,389. Upon redemption said shares were canceled or retired. The Murphey Co. never traded in its own stock by buying from one customer and selling to another. It is stipulated between the parties that if the Court finds that the sum of \$20,389 rep-

representing the net discount on the redemption of the preferred stock is part of the accumulated earnings or profits of the petitioner, then the amount of the accumulated earnings or profits of the Murphey Co. from February 28, 1913, to September 9, 1938, was \$108,509.80; and if the said sum of \$20,389 is not a part of the accumulated earnings or profits of the Murphey Co., then the amount of the accumulated earnings or profits to September 9, 1938, was \$88,120.80 (the difference being \$20,389.)

Beginning with the year 1920, the business of the Murphey Co., in line with other investment companies, began to expand. It was for this reason that in 1928 preferred stock was issued. However, its zenith was reached in 1929, and thereafter during the early 1930's the business substantially decreased. As a result, all of the preferred stock was retired before and during 1932. By 1938 the business was substantially greater than in 1934.

The inventories of securities carried by the Murphey Co., as far as the record shows, were as follows:

Fiscal year ended	Amount	Fiscal year ended	Amount
1928	\$485,703.20	1934	\$ 60,649.69
1929	776,930.72	1938	183,511.49
1933	90,730.49	1939	379,473.79

[21]

The gain of \$20,389 realized by the Murphey Co. upon the redemption of all of its preferred stock is a part of its accumulated earnings or profits, which amounted to \$108,509.80 in September 1938.

OPINION

Harron, Judge: The Commissioner determined a deficiency of \$3,224.86, in petitioner's income tax for the fiscal year ended June 30, 1939, by applying section 115 (g) of the revenue Act of 1938¹ to the redemption and cancellation of 75 percent of the common capital stock of Murphey, Favre & Co. (the Murphey Co.) owned by petitioner, which owned 100 percent of the stock of that company, and thus taxing a part of the amount received by petitioner as an ordinary dividend.

There was distributed to petitioner by the Murphey Co. the sum of \$176,746.56, in cash and property, upon the surrender of 750 shares of the stock of that company. It had been agreed by the respective officers of the Murphey Co. and petitioner that the distribution should be made in securities having a total value of \$60,100.92, and in cash in the amount of \$116,645.63; and that the source of part of the cash was to be 75 percent of the total paid-in surplus and 75 percent of the total earned sur-

¹Sec. 115. Distribution by Corporations.

* * * * *

(g) Redemption of Stock.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend—at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

plus, as of July 31, 1938, or, \$58,058.17 from paid-in surplus and \$43,688.38 from earned surplus.

In its income tax return for the fiscal year ending in 1939, petitioner included \$43,688.38 in its gross income as income from dividends from Murphey Co. That amount represented 75 percent of the earned surplus of the Murphey Co. as of July 31, 1938, which petitioner had received as part of the distribution in September 1938, according to the understanding of the parties to the transaction. In determining the deficiency respondent increased the dividends received from the Murphey Co. by \$64,-821.42, his determination being that the distribution was a taxable dividend to the extent of earnings or profits accumulated after February 28, 1913, and that the total of adjusted accumulated earnings or profits after February 28, 1913, was \$108,509.80 as of the date of the distribution.

In its petition to this court petitioner alleged that it erred in including the sum of \$43,688.38 in income and, as a result, overpaid income tax in the amount of \$1,170.27.

The first question is whether the distribution from the Murphey Co. to petitioner on September 9, 1938, upon the surrender for cancellation [22] of 750 shares of Murphey Co. stock, was made at such time and under such conditions as to make the distribution and cancellation or redemption, in whole or in part, essentially equivalent to the distribution of a taxable dividend, within the meaning of section 115 (g).

In the event the first question is decided against petitioner, a second question is to be considered which relates to the amount of the distribution which is to be treated as a taxable dividend under section 115 (g). The parties have stipulated that the amount of the earnings or profits of the Murphey Co. accumulated after February 28, 1913, up to the time of the distribution to petitioner in cancellation or redemption of its stock in Murphey, is \$108,509.80, including a net profit of \$20,389 realized by Murphey upon cancellation and retirement of all of its preferred stock prior to the taxable year. The second question is whether \$20,389 should be regarded as part of the accumulated earnings or profits of the Murphey Co. for the purpose of section 115 (g) in this proceeding, being petitioner's contention that the redemption of the preferred stock was a capital transaction and that any profit realized by the Murphey Co. thereon does not increase its accumulated earnings or profits after February 28, 1913. Petitioner contends that for the purpose of section 115 (g), if it is applied in this case, the accumulated earnings of the Murphey Co. did not exceed \$88,120.80. Respondent takes the opposite view, contending that the above profit increased the accumulated earnings or profits to \$108,509.80.

Issue 1.—Petitioner contends that section 115 (g) does not apply, and the entire amount of \$176,746.55 received by virtue of the redemption of 750 shares of Murphey Co. stock was a distribution in

partial liquidation covered by section 115 (c),² and that, since it was no more than the cost of the stock redeemed, there is nothing to tax. Petitioner admits that the redemption of the 750 shares of the Murphey Co. stock was to enable petitioner to sell all of the common stock of the Murphey Co.

Respondent contends that the distribution in question did not have any of the characteristics of a dividend in partial liquidation, citing, *Rheinstrom v. Conner*, 33 Fed. Supp. 917; *affd.*, 125 Fed. (2d) 790; *certiorari denied*, 317 U. S. 654; *rehearing denied*, 317 U. S. 708; [23] that there was no thought on the part of the officers of the Murphey Co. at the time of the distribution to liquidate its business, citing, *McGuire v. Commissioner*, 84 Fed. (2d) 431; *certiorari denied*, 299 U. S. 591; *W. & K. Holding*

²Sec 115. Distributions By Corporations.

* * * * *

(c) Distributions In Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * * In the case of amounts distributed (whether before January 1, 1938, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *

Corporation, 38 B. T. A. 830; and that the time at which and the manner in which the redemption of Murphey Co. stock was made were such that the redemption effected a distribution of earnings or profits, citing *George Hyman*, 28 B. T. A. 1231; *affd.*, 71 Fed. (2d) 342; *certiorari denied*, 293 U. S. 570; *William H. Grimditch*, 37 B. T. A. 402; and *E. M. Peet*, 43 B. T. A. 852.

The facts, in many respects, are similar to the facts in *George Hyman*, *supra*. Here, as in the *Hyman* case, petitioner was the sole stockholder of a corporation which had a substantial surplus as of July 31, 1938. Petitioner, by causing the Murphey Co. to cancel 75 percent of its stock on the basis of par plus 75 percent of paid-in surplus and 75 percent of earned surplus, received an amount greater than the adjusted earned surplus of \$108,509.80. The same effect resulted in the distribution in the *Hyman* case, and what was said there, at page 1233 of the report of the Board of Tax Appeals, may be said here, appropriately, with slight modification to fit the facts in this case, to wit: Thus, as to the amount of the surplus of the Murphey Co., petitioner was in no different situation from what it would have been in had there been an ordinary dividend; and the only difference to the Murphey Co., is that it had a reduced capital, which, after the distribution, was represented by an outstanding 250 shares instead of 1,000. "From such facts it is just as conceivable that the redemption and cancellation were essentially equivalent to a dividend as it is that they were not; and, since the respondent has

determined that they were and the burden of proof is on petitioner, we cannot affirmatively find that it was not."

There is little evidence relating to the business activities of the Murphey Co. The testimony of its secretary-treasurer was limited and general on this subject. He testified that the volume of business decreased after 1932. The evidence shows that the inventories of the Murphey Co. increased from \$485,703 at the end of 1928 to \$776,930.72 at the end of 1929. In August of 1928 capital was increased from \$190,000 to \$450,000, and part of the increase consisted of 2,335 shares of preferred stock which were issued for \$233,500 in cash. In 1931 and 1932 all of the preferred stock was redeemed, so that the capital of the Murphey Co. was reduced by approximately \$200,000. Also, in June 1932 the authorized common stock was reduced from 2,000 shares to 1,000 shares. The books of the Murphey Co. were not produced at the trial, and the evidence does not show the reason for this reduction or what adjustments were made on the books after the reduction. Lacking evidence, it must be assumed that the reduction [24] of the common stock reduced book capital by \$100,000 and increased book accumulated earnings by \$100,000. We think the above is evidence that the Murphey Co. had substantially adjusted its capital downward by the end of 1932 in harmony with its decrease in business and the decrease in its need for capital. A legitimate business reason for increasing the capital stock of a corporation is found in the need for acquiring capital to

carry on increased business, and, correspondingly, a decrease in business will provide a business reason for reducing capital stock.

The existence of a substantial amount of accumulated undivided profits or earnings available for the payment of dividends, at a time when there is a distribution upon a redemption of stock, invites close scrutiny of the distribution. Part of petitioner's burden of proof is to show that the redemption of the stock in 1938 was not a cloak for the distribution of taxable dividends. In this case the record contains testimony that in September 1938 the Murphey Co. did not need as much as it had in the past to carry its inventory. One interpretation to put upon such evidence is that the business needs of the Murphey Co. did not require retention of the very substantial accumulation of earnings and profits, and business conditions were such that a declaration and distribution of a dividend would have been within the lines of good management. Petitioner has failed to introduce evidence, under its burden of proof, to show that the retirement of 750 shares was intended to be for Murphey's business purposes. On the other hand, the resolution of the directors of the Murphey Co. adopted at the meeting of September 6, 1938, clearly evidences an intent to distribute 75 percent of the accumulated earnings. This intent could have been carried out by declaring and distributing a dividend of 75 percent of accumulated earnings. The Murphey Co. did not declare dividends for its fiscal year ended June

30, 1938, and there is no evidence to show that it did in the fiscal year 1939.

Eugene B. Favre, an officer and director of the Murphey Co., and others associated with the company wished to purchase petitioner's holdings in the Murphey Co. for about \$50,000. Favre was also a director of petitioner. The plan which was adopted to carry out the proposed transaction between petitioner and Favre and his group accomplished two things, a distribution to petitioner of part of the net worth of the Murphey Co. and the exclusion of petitioner as a stockholder. When the entire transaction was completed petitioner had received a total of \$228,581.72, but all that the vendees paid for petitioner's stock was \$51,835.16. The redemption of 750 shares of Murphey Co. stock was a step in the plan under which the capital stock was reduced from 1,000 shares to 250 shares. The redemption served to distribute part of the earnings to petitioner without a dec- [25] laration of a dividend, although petitioner could have caused the Murphey Co. to declare a dividend. The entire plan enabled petitioner to receive 75 percent of the net worth of the Murphey Co. and to sell the remaining 25 percent for a price which the vendees could pay.

It is conceivable that a plan of this sort to change the ownership of a corporation could have a real business advantage to the corporation, itself, for a change in management, incident to a change in ownership could be necessary, advantageous, and conducive to the better conduct of business. But there is no evidence that such purposes were the reason for

the plan for the change in ownership of the Murphey Co. Cf., *Bona Allen, Jr.*, 41 B. T. A. 206. Petitioner cites the Allen case as authority to support its contention that the reduction in the capital stock of the Murphey Co. served a business purpose so as to take the transaction out of the scope of section 115 (g). But the facts in the Allen case do not resemble the facts here in any way. There, stock was redeemed at par in satisfaction of debts of stockholders to the corporation. It was necessary that such debts be reduced to improve the credit standing of the corporation. Also, the corporation needed to retain its cash in the conduct of its business, and the business requirements of the corporation did not permit a distribution of a dividend.

None of the officers of the Murphey Co. were called by petitioner as witnesses. The failure of petitioner to introduce evidence to show a business purpose from the standpoint of the Murphey Co., itself, makes it difficult, if not impossible, to reverse respondent's determination. Also, the reduction in the stock appears to have been initiated by petitioner for the purpose of facilitating the sale of all of petitioner's interest in the Murphey Co. for about \$50,000 and, at the same time, to enable petitioner to receive 75 percent of the net worth of the company. Such does not in itself evidence a business purpose to the corporation affected. The entire plan was to accommodate petitioner and the vendees, and the circumstances were such that the conduct and operation of the business of the Murphey Co. was not affected. The business of the Murphey Co. did

not decrease as a result of the distribution upon the redemption of the stock. It went on profitably after the transaction just as it had prior to the whole transaction. The decrease in stock has not been shown to have been related to any decrease in the business of the Murphey Co. In fact, its business was greater in its fiscal year ended June 30, 1939, the year in which the redemption took place, than it was in the preceding fiscal year.

Under section 115 (g) the effect of the redemption is of the greatest importance, and it is not determinative of a question arising under that section whether the stock redeemed was or was not issued as a stock dividend. *Flanagan v. Helvering*, 116 Fed. (2d) 937; *Smith v. United [26] States*, 121 Fed. (2d) 692. No doubt some weight should be given to the fact that out of the total issued common stock (2,000 shares before the reduction to 1,000 shares in October 1929), 750 shares were issued as stock dividends, resulting in the capitalization of \$75,000 of earnings and profits. Thus 37½ percent of the outstanding stock represented corporate profits. However, we do not rest our conclusion solely upon this fact because of the reduction in stock which took place in October 1929, under which, presumably, \$100,000 was transferred from capital to earnings, and neither party has enlightened us with respect to the significance of that reduction of stock. The applicability of section 115 (g) is unaffected by whether the stock redeemed was or was not issued as a stock dividend. See *Vesper Co. v. Commissioner*, 131 Fed. (2d) 200.

It was provided in the written resolution that the entire distribution in the amount of \$176,746.56 should include an amount representing 75 per cent of earned surplus as of July 31, 1938. Thus, those in control of the Murphey Co. and representing the petitioner in this case themselves recognized that the distribution was in part the equivalent to the distribution of a taxable dividend. The petitioner even reported this amount in its return as a taxable dividend. Section 115 (g) provides that if the cancellation or redemption "in part" is essentially equivalent to the distribution of a taxable dividend, then the amount so distributed to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend. The amount which the written resolution recognized as earnings was an incorrect amount. The parties have stipulated the amount of accumulated earnings available at the time. Therefore, following section 115 (g), that amount is to be treated as a taxable dividend.

The ratio decidendi in *Hyman v. Helvering*, 71 Fed. (2d) 342, fits the facts of this case exactly. That reasoning need not be repeated here, but to it reference is made. In our opinion this case is controlled by the *Hyman* case.

It is held that petitioner has failed to overcome the prima facie correctness of respondent's determination that section 115 (g) applies to the distribution in question, and that the amount distributed shall be treated as a taxable dividend to the extent of the accumulated earnings and profits.

Petitioner relies on *Parker v. United States*, 88 Fed. (2d) 907, which held that section 115 (g) can not cover redemption payments made to an intervening purchaser for value. In our opinion the *Parker* case is not applicable here in view of the many factors present here which were not present in that case. See *Flanagan v. Helvering*, *supra*, where the court did not consider the *Parker* case applicable. [27]

We have here a distribution between two domestic corporations. In *Salt Lake Hardware Co.*, 27 B. T. A. 482, which decided a question arising under the Revenue Act of 1926, it was said that section 201 (g) of the 1926 Act, which corresponds to section 115 (g) of the 1938 Act, could not apply to distributions between corporations which are non-taxable. Here the distributee was a holding company and taxable upon dividends from a domestic corporation. What was said in *Salt Lake Hardware Co.*, *supra*, has no application here.

Issue 2.—The second issue relates to the amount of the accumulated earnings of the *Murphey Co.* for the purpose of applying section 115 (g) in this case. The *Murphey Co.* realized a gain of \$20,389 upon the redemption of all of its preferred stock. Of course that gain was not a taxable gain. But we think it must be considered as constituting part of the "earnings or profits accumulated after February 28, 1913." In *R. N. Weyerhaeuser*, 33 B. T. A. 594, 597, it was stated that many items such as interest upon the obligations of a state and dividends from other corporations "must necessarily be con-

sidered in computing earnings and profits, though forming no part of taxable net income." In *Charles F. Ayer*, 12 B. T. A. 284, 287, it was pointed out that the earnings or profits mentioned in section 201 (a) of the Revenue Act of 1921 (which corresponds to section 115 (a) of the Revenue Act of 1938 and of the Internal Revenue Code) are not the equivalent of the taxable net income of a corporation. It may be said here that "earnings or profits" referred to in section 115 (g) are the same as are referred to in section 115 (a), the latter section being somewhat redundant.

The tax free profit realized upon the redemption of the preferred stock is taxable to a stockholder upon distribution, just as tax free interest on exempt bonds is part of earnings and profits and may form part of ordinary dividends which are taxable when received by stockholders. Under the reasoning of *Charles F. Ayer*, *supra*, respondent's determination that the accumulated earnings or profits of the *Murphey Co.* includes the profit from the redemption of the preferred stock is sustained. For the purpose of section 115 (g), as applied here, the accumulated earnings or profits of the *Murphey Co.* amounted to \$108,509.80.

Decision will be entered for the respondent. [28]

The Tax Court of the United States
Washington

Docket No. 110389

UNITED NATIONAL CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated June 15, 1943, it is

Ordered and Decided: That there is a deficiency in income tax for the fiscal year ended June 30, 1939 in the amount of \$3,324.65.

(Signed) MARION J. HARRON
Judge.

(Seal)

Entered Jun 25 1943. [29]

[Title of Court and Cause.]

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now United National Corporation, the pe-

itioner in this cause, by Roger L. Shidler, counsel for petitioner, and respectfully shows that:

I.

The petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office in Seattle, Washington. The income tax return of said corporation for the fiscal year ended June 30, 1939, was duly filed with the Collector of Internal Revenue for the District of Washington, which is within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

[30]

II.

The Nature of the Controversy.

The controversy involves the proper determination of the petitioner's liability for federal income tax for the fiscal year ended June 30, 1939.

The petitioner seeks to review only the second issue of the two decided by the Tax Court of the United States.

During the taxable year, Murphey, Favre & Co. redeemed 750 shares of its common stock, which was held by the petitioner and paid to petitioner, in connection with said redemption, \$176,746.55 in cash or property.

The Tax Court of the United States found and held that the distribution to petitioner, in connection with the liquidation of Murphey, Favre & Co., was made at such time and under such conditions as to make the distribution upon the cancellation or

redemption of the 750 shares of stock of Murphey, Favre & Co. essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115 (g) of the Internal Revenue Code, to the extent of the accumulated earnings or profits. From this determination, the petitioner does not appeal.

The only issue left in the case for determination on appeal is the amount of the accumulated earnings or profits of Murphey, Favre & Co. on the date of the distribution, pursuant to the redemption of the 750 shares of stock. The facts on this issue as shown by the findings of the lower court are:

[31]

On June 30, 1929, Murphey, Favre & Co. redeemed shares of its preferred stock at a premium over par value in the total amount of \$30. On June 30, 1931, Murphey, Favre & Co. redeemed shares of its preferred stock at a discount from the par value of the shares in a total amount of \$19,588.90. On June 30, 1932, Murphey, Favre & Co. redeemed shares of its preferred stock at a discount from the par value of the shares in the total amount of \$830.10. All of the above redemptions were at a net discount of \$20,389. Upon redemption said shares were canceled or retired. Murphey, Favre & Co. never traded in its own stock by buying from one customer and selling to another. It was stipulated between the parties that if the Court found that the sum of \$20,389 representing the net discount on the redemption of the preferred stock is part of the accumulated earnings or profits of the

petitioner, then the amount of the accumulated earnings or profits of Murphey, Favre & Co. from February 28, 1913, to September 9, 1938, was \$108,509.80; and if the said sum of \$20,389 is not part of the accumulated earnings or profits of Murphey, Favre & Co., then the amount of the accumulated earnings or profits to September 9, 1938, was \$88,120.80 (the difference being \$20,389).

The respondent contended that the \$20,389, being the discount from par value on the redemption of the shares of Murphey, Favre & Co., was a part of the accumulated earnings or profits. The Tax Court of the United States sustained respondent's contention. The petitioner contends that the redemption of the preferred [32] stock was a capital transaction and that no part of the discount was a part of accumulated earnings or profits of Murphey, Favre & Co.

III.

The petitioner, being aggrieved by the conclusions of law contained in the findings and opinion of the Tax Court of the United States and by its decision entered pursuant thereto, desires a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

Assignment of Error.

The petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

1. The determination by the Tax Court of the

United States that the sum of \$20,389, representing the discount on the redemption of the preferred stock of Murphey, Favre & Co., was a part of the accumulated earnings or profits of Murphey, Favre & Co., and that petitioner received taxable income in any amount greater than \$88,120.80 upon the partial liquidation of Murphey, Favre & Co. on the redemption of 750 shares of common stock of Murphey, Favre & Co. held by petitioner.

ROGER L. SHIDLER

Counsel for Petitioner.

410 American Building,

Seattle 4, Washington. [33]

State of Washington

County of King—ss.

Roger L. Shidler, being first duly sworn, on his oath says:

That he is counsel of record in the above-entitled cause; that, as such counsel, he is authorized to verify the foregoing petition for review. That he has read the said petition and is familiar with the statements contained therein, and that the statements made are true to the best of his knowledge, information and belief.

ROGER L. SHIDLER

Subscribed and sworn to before me, this 11 day of August, 1943.

(Seal) MARIE K. LOMBARD

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: T. C. U. S. Filed Aug. 16, 1943. [34]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To General Counsel,

Bureau of Internal Revenue, Treasury Department,
Washington, D. C.:

Please take notice that the petitioner, on the 16th day of August, 1943, filed with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above cause. A copy of the petition for review and the assignments of error, as filed, is hereto attached and served upon you.

Dated at Seattle, Washington, this 10th day of August, 1943.

(S) ROGER L. SHIDLER

Counsel for Petitioner,
410 American Building,
Seattle 4, Washington.

Service of a copy of the foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 16th day of August, 1943.

(S) J. P. WENCHEL

Chief Counsel,
Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Aug. 17, 1943. [35]

[Title of Court and Cause.]

STATEMENTS OF POINTS TO BE RELIED
UPON ON APPEAL

Comes now the petitioner, United National Corporation, by its attorney, Roger L. Shidler, and designates the following as a statement of points intended to be relied upon by petitioner herein on appeal.

I.

That the sum of \$20,389, representing the net discount on the redemption in previous years of preferred stock of Murphey, Favre & Co., was no part of the accumulated earnings or profits of Murphey, Favre & Co. at the time of the partial liquidation of Murphey, Favre & Co. by the redemption of 750 shares of its stock held by petitioner.

ROGER L. SHIDLER

Attorney for Petitioner,
410 American Building,
Seattle 4, Washington.

[Endorsed]: T. C. U. S. Filed Aug. 16, 1943. [36]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Cir-

cuit Court of Appeals for the Ninth Circuit a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of the record the following documents or certified copies thereof, to-wit:

1. The docket entries of all proceedings before the Tax Court of the United States.

2. Pleadings before the Tax Court of the United States as follows:

(a) Petition for redetermination, and copy of notice of deficiency of tax.

(b) Answer to petition. [37]

3. The findings of fact and opinion of the Tax Court of the United States.

4. The decision of the Tax Court of the United States.

5. The petition for review filed by the petitioner in the above cause.

6. Statement of points to be relied upon by petitioner.

7. This praecipe.

ROGER L. SHIDLER

Counsel for Petitioner,
410 American Building,
Seattle 4, Washington.

Service of a copy of this praecipe is hereby acknowledged as of August 18, 1943.

(S) J. P. WENCHEL

Chief Counsel,
Bureau of Internal Revenue.

[38]

[Title of Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 38, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeipie in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 8th day of September, 1943.

(Seal)

B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10556 United States Circuit Court of Appeals for the Ninth Circuit. United National Corporation, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed September 20, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 10556

UNITED NATIONAL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ADOPTION OF STATEMENT OF POINTS
APPEARING IN THE TRANSCRIPT OF
RECORD AS TO THE STATEMENT OF
POINTS ON APPEAL.

Comes now the petitioner, United National Corporation, by its attorneys, Harroun & Shidler and Roger L. Shidler, and hereby adopts as the points on appeal the statement of points appearing in the transcript of the record.

HARROUN & SHIDLER and
ROGER L. SHIDLER,
Attorneys for Petitioner.

[Endorsed]: Filed Sept. 27, 1943. Paul P. O'Brien, Clerk.

No. 10556

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED NATIONAL CORPORATION, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW FROM THE TAX COURT OF
THE UNITED STATES

BRIEF FOR THE PETITIONER

ROGER L. SHIDLER and
HARROUN & SHIDLER,
Attorneys for Petitioner.

410 American Building,
Seattle, Washington.

FILED

NOV 5 - 1943

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED NATIONAL CORPORATION, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW FROM THE TAX COURT OF
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BRIEF FOR THE PETITIONER

ROGER L. SHIDLER and
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Attorneys for Petitioner.

410 American Building,
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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED NATIONAL CORPORATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 10556

ON PETITION FOR REVIEW FROM THE TAX COURT OF
THE UNITED STATES

BRIEF FOR THE PETITIONER

OPINION BELOW

This case involves income tax for the fiscal year ended June 30, 1939, in the amount of \$3,224.86, as found by a decision of The Tax Court of the United States, entered June 15, 1943 (R. 43). Only part of the asserted deficiency is in controversy here. The case is brought to this court by a petition for review, filed August 16, 1943 (R. 43 to 47), pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

When a corporation repurchases shares of its preferred stock for less than their par value and retires the shares, is the difference between the par value

and the repurchase price a part of its accumulated earnings or profits which would be taxable to the recipient if distributed under the circumstances set forth in 115(g) of the Internal Revenue Code?

STATEMENT OF THE CASE

The petitioner is a corporation, organized under the laws of the State of Washington, with its principal office in Seattle, Washington. It keeps its accounts and prepares its income tax returns on the accrual basis. The petitioner, within the time provided by law, filed with the Collector of Internal Revenue for the District of Washington, at Tacoma, Washington, its income tax return for the fiscal year ended June 30, 1939.

The petitioner accepts the findings of fact as made by The Tax Court of the United States (R. 19 to 29). Only a question of law is involved, based on the findings with respect to issue 2 (R. 28-29).

On September 6, 1938, the petitioner owned all of the outstanding 1,000 shares of common stock of Murphey, Favre & Co., a Washington corporation (hereinafter, for brevity, called Murphey) (R. 19). All of the preferred stock of Murphey had been retired prior to 1933 (R. 23). The petitioner desired to sell all of the shares of Murphey owned by it, but the purchasers did not have sufficient funds to purchase the entire block of stock. In order to make the sale, the charter of Murphey was amended in order to effect a reduction in the number of outstanding shares of stock from 1,000 shares of common stock to 250 shares of common stock. Upon the surrender

and cancellation of the 750 shares held by petitioner, there was distributed to petitioner, on or about September 6, 1938, 75% of the assets of Murphey, the amount so distributed being \$176,746.25. On September 16, 1938, petitioner sold the remaining 250 shares of common stock and Murphey continued in business (R. 23-24).

The Tax Court of the United States determined that, pursuant to section 115(g) of the Internal Revenue Code, the distribution received by petitioner was taxable to it, to the extent of the accumulated earnings or profits of Murphey as of the date of distribution. The petitioner does not appeal from this determination. The only question is: What was the amount of the accumulated earnings or profits as of the date of distribution? The petitioner contends that the amount of the accumulated earnings or profits was \$88,120.80, while the respondent contends that the correct figure is \$108,509.80 (the difference being \$20,389.00) (R. 29). The difference arises in this manner: On three occasions during the period from 1929 to 1932, Murphey repurchased its shares of preferred stock for retirement for a net sum of \$20,389.00 less than the par value of the shares so purchased. The shares were retired or cancelled. Murphey never traded in its own stock by buying from one customer and selling to another (R. 28).

NUMERICAL SPECIFICATION OF ERRORS RELIED UPON

1. (R. 49)

SUMMARY OF ARGUMENT

The Tax Court of the United States erroneously concluded that the sum of \$20,389, representing the net difference between the par value and the repurchase price by Murphey of shares of its preferred stock for retirement, was part of the accumulated earnings or profits of Murphey when a partial liquidation of Murphey took place by a reduction in its capital stock and the retirement of part of its outstanding shares.

ARGUMENT

Where a corporation repurchases its shares of preferred stock for less than the par value of the shares and retires the shares, the amount of the difference between the par value and the repurchase price is not a part of its earnings or profits.

Assignments of Error

The petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The determination by The Tax Court of the United States that the sum of \$20,389, representing the discount on the redemption of the preferred stock of Murphey, was a part of the accumulated earnings or profits of Murphey and that petitioner received taxable income in any amount greater than \$88,120.80 upon the partial liquidation of Murphey on the redemption of 750 shares of stock of Murphey held by petitioner.

The petitioner has acquiesced in the determination by The Tax Court of the United States in these proceedings that the distribution by Murphey to peti-

tioner, on the redemption of 750 shares of stock of Murphey held by petitioner, is taxable income to the petitioner, to the extent of the accumulated earnings or profits of Murphey. The only question left is: Was the amount of the difference between the par value of the shares of Murphey redeemed and the price paid by Murphey for the shares for redemption, a part of the accumulated earnings or profits of that corporation? The Tax Court of the United States held that it was. The petitioner contends that redemption was a capital transaction and had no effect on the accumulated earnings or profits.

Neither the Internal Revenue Code nor the Regulations contain an inclusive definition of the term Earnings or Profits. Reg. 103, Sec. 19.115-3 provides in part as follows:

“Among the items entering into the computation of corporate earnings or profits for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22(a) or corresponding provisions of prior Revenue Acts.”

As has been said, the phrase must be given its ordinary and usual meaning. It is, however, clear that before a corporation can have earnings or profits, it must have had a gain.

Regulation 103, section 19.22(a)-16 provides as follows:

“ACQUISITION OR DISPOSITION BY A CORPORATION OF ITS OWN CAPITAL STOCK Whether the acquisition or disposition by a corporation of

shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

“But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Internal Revenue Code.”

It should be kept in mind that The Tax Court of the United States in effect found that Murphey, Favre & Co. did not deal in its own shares as it would in the shares of another corporation. The lower court found as a fact that:

“The Murphey Co. never traded in its own stock by buying from one customer and selling to another. * * * Upon redemption, the shares were cancelled or retired.” (R. 28).

No case can be found holding that, when a corpora-

tion repurchases its shares, it realizes a gain. There is authority to the effect that if a corporation resells its shares for more than it paid for them, it realizes a profit, providing it is dealing in its shares as it might in the shares of another corporation.

If Murphey could not, under the above quoted Regulation, realize any gain or loss from the redemption of the preferred shares here in question, it is difficult to see how the transaction could increase its earnings or profits. The Tax Court of the United States, in its opinion, confused the point at issue with an entirely different point. The lower court fell into error by assuming that there was a gain to Murphey upon the repurchase of its preferred shares for retirement. That is the point at issue. It was stated in the opinion that there are many kinds of income which are not taxable income, yet would increase the earnings or profits. That this is true goes without saying; nevertheless, in such transactions, there is a gain — true, non-taxable because made specifically so by law, but, nonetheless, a gain. Here there was no gain upon the redemption of shares for less than par value. Murphey merely distributed some of its assets and reduced the number of its outstanding shares of preferred stock. The capital stock of a corporation is in no true sense a liability of the corporation. It is not a debt nor can payment be demanded.

“For bookkeeping purposes, the company acknowledges a liability in form to the stockholder equivalent to the aggregate par value of their stock, evidenced by a ‘Capital stock account’ * * * none of these, however, give to the stockholders

as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them * * *”

Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. ed. 521.

The par value of preferred shares denotes but very little as to the rights accruing to the shareholder in connection with the shares. The redemption price may be more or less than the par value. Suppose that, at the time the redemption occurred, Murphey had net assets of a worth less per share than the price paid for the preferred shares which it purchased. Could it be said that the corporation has added to its earnings or profits by the redemption of its shares? In such a case, the remaining shareholders would be worse off than before the redemption as their per share value would be less.

No gain accrues to a corporation upon the redemption of its shares of stock. It does not acquire anything; indeed, it has less assets after the redemption than it had before. See *E. R. Squibb & Sons v. Helvering* (C.C.A. 2) 98 F.(2d) 69, for an interesting discussion of the effect of the repurchase by a corporation of its own shares.

As was said in *Houston Brothers Co. v. Commissioner of Internal Revenue*, 21 B.T.A. 804:

“Before it can be said that a corporation has profit, it must be found not only that it has disposed of its property, but that it has received assets of greater value than the cost of those disposed of. But since a corporation’s own shares

are not assets, but only the convenient machinery for evidencing shareholders' interests, it is a fallacy to say it has received anything and, *a fortiori*, that it has received a gain."

In *Liberty Agency Co. v. Commissioner of Internal Revenue*, 5 B.T.A. 778, it was held that a corporation realized no gain on the redemption of its preferred shares, the opinion saying:

"We are of the opinion that the petitioner realized no taxable gain when it purchased its own preferred stock at a cost to it of \$5,025.00 less than its stockholders had theretofore paid for it. This was wholly a capital transaction."

This court has decided an analogous case contrary to the contentions of respondent. In *Commissioner of Internal Revenue v. Inland Finance Co.* (C.C.A. 9) 63 F.(2d) 886, the question before the court was whether a corporation realized a gain when payments on stock subscription contracts were forfeited for non-payment of installments. It was held that such payments did not constitute income to the corporation, the court saying:

"We are of opinion that the Board correctly determined that the forfeited payments did not constitute 'income' as the term has been defined; namely, gain derived from capital or labor or from both combined. *Eisner v. Macomber*, 252 U.S. 189, 207, 40 S. Ct. 189, 65 L. ed. 521."

The analogy between the foregoing case and the case at bar is strongly brought out in the opinion of the Board of Tax Appeals in a case dealing with forfeitures of stock subscriptions.

"The payments on account of the stock sub-

scriptions at the time they were made were undoubtedly capital payments, being made to provide capital for the corporation, and were in its hands capital receipts as distinguished from income. The fact that payments were made in installments and stock was never issued for such payments because they were not made to the full amount of the subscription does not alter their character."

Appeal of Illinois Rural Credit Association,
3 B.T.A. 1178.

See also to the same effect:

Industrial Loan & Investment Co., 17 B.T.A.
1328;

Realty Bond & Mortgage Co. v. U. S. (C. of
Claims) 17 F. Supp. 771.

When a payment on a stock subscription contract is forfeited, the corporation has additional funds against which it has no corresponding obligations. This court has said that such forfeited payments are not "gain" to the corporation, citing the definition of "gain" as laid down by the Supreme Court of the United States in *Eisner v. Macomber*, 252 U.S. 189, 40 S. Ct. 189, 64 L. ed. 521. If the payments on forfeited subscription contracts do not constitute a gain, it can hardly be said that the net discount on the repurchase of preferred shares constitutes a gain. In both cases, the receipt of the funds originally paid in on the transaction constitutes a capital transaction. No subsequent event can change the character of the payments to earnings or profits.

CONCLUSION

It is submitted that The Tax Court of the United States was in error in holding that the earnings or profits of Murphey were increased by the repurchase of its preferred shares at less than their par value.

Respectfully submitted,

ROGER L. SHIDLER and

HARROUN & SHIDLER,

Attorneys for Petitioner.



No. 10556

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED NATIONAL CORPORATION, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
ROBERT N. ANDERSON,
I. HENRY KUTZ,

Special Assistants to the Attorney General.

FILED

DEC 20 1941

PAUL P. O'BRIEN,
CLERK

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COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is the opinion of The Tax Court of the United States (R. 18-42), reported in 2 T. C. 111.

JURISDICTION

This petition for review involves federal income taxes for the fiscal year ended June 30, 1939. (R. 3-14.) On January 17, 1942, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency of income tax in the amount of \$3,224.86. (R. 3, 11-12.) Within 90 days thereafter and on April 3, 1942, the taxpayer filed a petition with the

then Board of Tax Appeals (now The Tax Court) for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. The final order and decision of The Tax Court of the United States sustaining a deficiency in income tax for the fiscal year ended June 30, 1939, in the amount of \$3,324.65 was entered on June 25, 1943. (R. 43.) The case is brought to this Court by petition for review filed August 16, 1943 (R. 43-47), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. This petition seeks to review only part of the deficiency found by the decision of The Tax Court. (R. 45.)

QUESTION PRESENTED

Whether the sum realized by a corporation, upon purchase and retirement of all of its preferred stock at a discount from par value, shall be regarded as part of its accumulated earnings or profits, taxable to the recipient, its sole stockholder, if distributed at such time and in such manner, as to be essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115 (g) of the Revenue Act of 1938.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved may be found in the Appendix, *infra*.

STATEMENT

The taxpayer, United National Corporation, accepts the findings of fact made by The Tax Court. (Br. 2.)

The Tax Court found as follows: Taxpayer was

incorporated under the laws of the State of Washington and is engaged in business as a holding company. (R. 19.) From the beginning of the taxable year, up to September, 1938, taxpayer owned all the outstanding stock of another corporation, Murphey, Favre & Company, hereinafter referred to as Murphey Company,¹ consisting of 1,000 shares of common stock. (R. 19.) Taxpayer first acquired an interest in Murphey Company in December, 1928, and at all times after June, 1932, until September, 1938, was its sole stockholder. (R. 23.) In August, 1928, Murphey Company obtained authorization to issue 2,500 shares of preferred stock at \$100 par value; 2,335 shares of this preferred stock were actually issued for a total cash consideration of \$233,500. (R. 22-23, 35.) The preferred stock was issued by reason of expansion in business. The zenith in this expansion was reached in 1929, however, and as a result of subsequent substantial decrease in business in the early 1930's, all of the preferred stock was retired (R. 29), as follows (R. 28):

On June 30, 1929, the Murphey Co. redeemed shares of its preferred stock at a premium over par value in the total amount of \$30. On June 30, 1931, the Murphey Co. redeemed shares of its preferred stock at a discount from the par value of the shares in a total amount of \$19,558.90. On June 30, 1932, the Murphey Co. redeemed shares of its preferred stock at a discount from the par value of the shares in the

¹ Murphey Company is also a Washington corporation, engaged in the investment banking business in Spokane. (R. 4-5.)

total amount of \$830.10. All of the above redemptions were at a net discount of \$20,389. Upon redemption said shares were cancelled or retired. The Murphey Co. never traded in its own stock by buying from one customer and selling to another.

Prior to September 6, 1938, some of the officers of Murphey Company, acting in their individual capacity, desired to purchase its outstanding stock from taxpayer. However, they were unable to raise sufficient funds for that purpose. (R. 23.) Accordingly, a plan was developed for the accommodation of taxpayer, whereby taxpayer was enabled to distribute a portion of the accumulated earnings and profits of the Murphey Company to itself, and, after such distribution, to sell the balance of its holdings in the Murphey Company to the proposed vendees at a price which they could pay. (R. 37.) To attain this end, the capital stock of Murphey Company was reduced on September 6, 1938, from 1,000 shares to 250 shares. (R. 26.)

Distribution was then made to taxpayer from the assets of Murphey Company upon the surrender and redemption of 750 out of its 1,000 shares of Murphey Company stock, in the total value of \$176,746.55. (R. 26.) After this redemption was effected, taxpayer sold its remaining 250 shares of Murphey Company stock to the Murphey officers for \$51,835.16. (R. 26-27.) The Tax Court found as a fact that the distribution by Murphey Company to its sole stockholder, the taxpayer, was essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115 (g) of the Revenue Act of

1938. (R. 28.) In this finding taxpayer acquiesces upon this appeal (R. 45), although it was the principal issue, which taxpayer contested in The Tax Court (R. 19).

Hence, as stated by taxpayer in its petition for review (R. 45):

The only issue left in the case for determination on appeal is the amount of the accumulated earnings or profits of Murphey, Favre & Co. on the date of the distribution, pursuant to the redemption of the 750 shares of stock.

The Tax Court computed the accumulated earnings and profits of Murphey Company between March 1, 1913, and June 30, 1938, as follows (R. 27):

Income as shown from income tax returns-----	\$608, 153. 50
Net additional taxable income resulting from audit reviews of returns-----	1, 748. 09
Additional nontaxable profit because of retirement of preferred stock at a discount-----	20, 389. 00
Total -----	\$630, 290. 59

On the other hand, during this period Murphey Company disbursed (R. 27):

Cash dividends-----	\$416, 192. 56
Income taxes-----	86, 612. 21
Insurance premiums-----	10, 856. 47
Donations-----	7, 114. 18
Total -----	\$520, 775. 42

Thus, the earnings and profits accumulated by Murphey Company during this period were \$109,515.17, adjusted—as agreed to by the parties—for certain items of \$1,005.37 to \$108,509.80. (R. 27.)

It was stipulated before the Tax Court (R. 28-29):

It is stipulated between the parties that if the Court finds that the sum of \$20,389 represent-

ing the net discount on the redemption of the preferred stock is part of the accumulated earnings or profits of the petitioner, then the amount of the accumulated earnings or profits of the Murphey Co. from February 28, 1913, to September 9, 1938, was \$108,509.80; and if the said sum of \$20,389 is not a part of the accumulated earnings or profits of the Murphey Co., then the amount of the accumulated earnings or profits to September 9, 1938, was \$88,120.80 (the difference being \$20,389.)

The Tax Court found (R. 27):

As of June 30, 1938, the paid-in capital, the paid-in surplus, and the earned surplus of the Murphey Co., were as follows:

Capital paid-in for stock.....	\$125,000.00
Paid-in surplus—cash paid in.....	47,400.00
Earned surplus, adjusted.....	108,509.80

Finally, The Tax Court found as a fact (R. 29):

The gain of \$20,389 realized by the Murphey Co. upon the redemption of all of its preferred stock is a part of its accumulated earnings or profits, which amounted to \$108,509.80 in September 1938.

SUMMARY OF ARGUMENT

Taxpayer accepts the findings of fact made by The Tax Court. Its claim, therefore, is that, as a matter of law, The Tax Court erred in holding that the \$20,389 realized by the Murphey Company from the retirement of its preferred stock at a discount constituted earnings and profits distributable as a dividend within the meaning of Section 115 (g) of the Revenue Act of 1938. However, at the moment the last share of

preferred stock was retired and the capital of the company reduced by its cancellation, the amount of \$20,389 became the property of Murphey Company for the benefit of its sole stockholder, the taxpayer, subject to no liability of any kind, stock or otherwise. This sum is over and above any capital investment represented by any outstanding shares, all of which were held by taxpayer. In every real sense it constitutes corporate gain. Acquisition of stock by a corporation, even where not traded by it upon the market, may result in gain. "Taxable corporate income" and "earnings and profits" are not the same. A gain to a corporation resulting from a tax free exchange may constitute earnings and profits and so may other tax free income; deductions permitted against taxable income may not be permitted against earnings and profits. In any event, the transaction is closed; if ever taxable, it must be taxable now. A reversal will afford a facile means of tax evasion.

ARGUMENT

The sum realized by a corporation, upon the purchase and retirement of all of its preferred stock at a discount from par value, forms part of its accumulated earnings and profits taxable to the recipient, its sole stockholder, if distributed at such time and in such manner, as to be essentially equivalent to the distribution of a taxable dividend, within the meaning of Section 115 (g) of the Revenue Act of 1938

The taxpayer accepts in their entirety the findings of fact made by The Tax Court. (Br. 2.) Hence, its claim here must be that, upon these facts as found, as a matter of law, the \$20,389 realized by Murphey Company from the retirement of its preferred stock

at a discount can not constitute earnings and profits distributable as a dividend within the meaning of Section 115 (g) of the Revenue Act of 1938. We will show that this position is without foundation.

Unquestionably, the sum of \$20,389 constituted part of the assets of Murphey Company and was actually distributed and received by the taxpayer. The Tax Court found as a fact that this sum did not form a part of either "capital paid-in for stock" or "paid-in surplus-cash paid in" (R. 27) and the taxpayer accepts this finding of The Tax Court. Hence, these funds must constitute an increase of and form part of the surplus of the Murphey Company.²

Construing the definition of "dividend" contained in Section 115 (a) of the Revenue Act of 1928, not differing in any respect material to the present consideration from the same section of the Revenue Act of 1938,³ in *Cummings v. Commissioner*, 73 F. 2d 477, 480, the Circuit Court of Appeals for the First Circuit said:

If these funds, however derived, belonged to the Company when received, they would go to increase its surplus, and it cannot be seriously argued that the *surplus funds in the hands of the company over and above its stock liability are not the earnings or profits contemplated by the section.* [Italics supplied.]⁴

² Indeed, the Commissioner determined that the item of \$20,389 represented "increase of surplus." (R. 14.)

³ See Appendix, *infra*.

⁴ In the cited case the funds distributed as dividends were derived from proceeds of insurance policies taken by the corporation upon the life of its president. The court, thus, supported a broad construction of "earnings and profits."

Certainly there is no stock liability here for this \$20,389. The *entire* issue of 2,355 shares of preferred stock, originally sold for a cash consideration of \$233,500 (R. 23, 35), had been repurchased and retired or cancelled at a net price below par, thus leaving this balance of \$20,389, included among the assets of the company (R. 28-29). Upon the redemption of the preferred stock the capital of the Murphey Company was reduced proportionately. (R. 35.) The only outstanding shares were the common stock, all belonging to taxpayer. It cannot be claimed that this fund of \$20,389 represents any capital contributed for common stock; indeed, as already pointed out, the findings of The Tax Court are to the contrary. (R. 27.) This is not a case of a return to preferred stockholders of capital contributed by them, but distribution to a common stockholder of a fund over and above any sum contributed or invested by it. To paraphrase the language of the cited case, these were surplus funds in the hands of the company over and above its stock liability, belong to the company and form part of its earnings and profits. Since the preferred stock was retired and none was outstanding during the taxable year, this sum was, as The Tax Court found, available to pay dividends on the common shares.

The average man would readily agree that an actual profit was realized. Indeed, it is clearly inferable from the conceded findings that Murphey Company repurchased the preferred stock, when and as it did, in order to obtain this gain. At the moment that the

last share of the preferred stock was retired, and the capital of the company, which the preferred stock represented, was reduced by its cancellation, the amount of \$20,389 became the property of Murphey Company for the benefit of its sole common stockholders, the taxpayer, subject to no liabilities of any kind. This is no theoretical question involving a future distribution, but an accomplished payment received by taxpayer during the tax period involved. The taxpayer's contention does not accord with the realities of the situation. Should it prevail in this case, then equally stockholders in receipt under similar circumstances of distributions of \$200,000 or \$2,000,000 over and above any capital contributed by them may evade tax liability. If this procedure is approved, a facile means is at hand for a company with substantial ready funds, taking advantage of a temporary market decline, to accumulate and distribute to its common stockholders enormous dividends, which the latter may then enjoy, evading their fair share of the tax burden.⁵

In *Morainville v. Commissioner*, 46 B. T. A. 753, 760, reversed on other grounds, 135 F. 2d 201 (C. C. A. 6th), the Board of Tax Appeals sustained the Commissioner's contention on facts closely similar to those at bar. There it will be noted that the amount realized by the purchase and retirement by

⁵ The purchase at a discount and retirement of preferred stock, during periods of market decline, especially by investment companies, is an accepted financial practice and believed to be a matter of common knowledge.

the corporation of its own preferred shares was very large. The Board said (p. 760):

Between 1927 and 1935 the company paid for some of its own preferred shares and realized a profit of \$1,279,583.80, which apparently has a place in the surplus, and petitioners would have it excluded from the available earnings. It appears only that the shares were purchased and ultimately retired. It is entirely possible that the amount is within earnings and profits from which taxable dividends may be distributed. *Commissioner v. Young Corporation*, 103 Fed. (2d) 137; *Allyne-Zerk Co. v. Commissioner*, 83 Fed. (2d) 525.

Moreover, from another aspect, the Commissioner's contention of a gain finds additional support. In one of the transactions whereby the preferred stock was purchased and redeemed, the Murphey Company paid a premium of \$30 over par value. (R. 28.) This premium was undoubtedly charged against the corporate earnings and profits. Had the purchase of the entire outstanding issue been made at a premium, the corporation would have undoubtedly claimed a corresponding reduction of earnings and profits. See *J. Weingarten, Inc. v. Commissioner*, 44 B. T. A. 798, 809, where the Board recently approved a charge against earnings and profits and a credit for dividends paid to the preferred stockholder, receiving the premium. If a charge against earnings and profits of the corporation is sustained, where a premium is paid for preferred stock purchased and cancelled, surely a corresponding credit to earnings and profits

results, when this stock is purchased and cancelled at a discount.

A recent decision of this Court establishes that the acquisition by a corporation of its own stock constitutes gain, *even though the corporation is not dealing with the stock upon the market*. In *Golden State T. & R. Corp. v. Commissioner*, 125 F. 2d 641, a wholly owned subsidiary distributed to the taxpayer corporation, there involved, a substantial number of shares of the taxpayer corporation's own stock. The taxpayer corporation, in the cited case, paid its subsidiary no consideration for these shares. This Court held that the acquisition of its own stock by this taxpayer represented corporate gain and was taxable as a dividend, even though the taxpayer corporation had not been dealing with its own shares upon the market. This Court said (p. 642):

Whether or not the acquisition of shares of its own stock by a corporation is taxable as income depends upon the nature of the transaction and not upon the disposition of the stock after acquisition (*Allyne-Zerk Co. v. Com'r*, 6 Cir., 83 F. 2d 525; *Com'r v. S. A. Woods Mach. Co.*, 1 Cir., 57 F. 2d 635; *Dorsey Co. v. Com'r*, 5 Cir., 76 F. 2d 339; *Com'r v. Boca Ceiga Development Co.*, 3 Cir., 66 F. 2d 1004, 1005; Treasury Regulations 77, Art. 66) unless the corporation is dealing with its own shares on the market, in which event the gain is clearly taxable (Treas. Reg. 77, Act of 1932, Art. 66, § 2) the same as in the case of any other stock purchased and sold by it. Thus it appears that it is immaterial whether or not the acquired

stock becomes treasury stock, either by action of the corporation or by operation of law, if it in fact represents corporate gain.

Moreover, if this gain is not now taxed it will never be taxed. In the case of a tax-free exchange, the recognition of the gain or loss is postponed; but here the stock has been retired, the gain realized and paid over to the stockholder. The shares are not being held in the treasury; they have been cancelled.

The Regulations⁶ which the taxpayer quotes in its brief (pp. 5-6) provides only that acquisition, of its own stock by a corporation may not, depending on circumstances, give rise to a "taxable gain"; the Regulations do not deny the existence of a "gain." So, in *Commissioner v. F. J. Young Corp.*, 103 F. 2d 137, the Circuit Court of Appeals for the Third Circuit held that a gain to a corporation, which resulted from a tax-free exchange of securities, must, nevertheless, be considered earnings and profits out of which a dividend may be declared (p. 139):

Section 115 (a) is simply a definition of the word "dividend" and merely distinguishes between a distribution out of "earnings and profits" and a distribution out of capital. The words "earnings or profits," as therein used, are words in common use, and "are to be given their natural, plain, ordinary, and commonly understood meaning." 59 C. J. p. 975, section 577; *Miller v. Robertson*, 266 U. S. 243, 45 S. Ct.

⁶ Regulations 103, Sec. 19.22 (a)-16, promulgated under the Internal Revenue Code, which is the same as Regulations 101, Art. 22 (a)-16, promulgated under the Revenue Act of 1938.

73, 69 L. Ed. 265; *DeGanay v. Lederer*, 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042; *Lake County v. Rollins*, 130 U. S. 662, 9 S. Ct. 651, 32 L. Ed. 1060. If Congress had intended to limit the meaning of the word "dividend" to a distribution out of "recognized" gains or out of taxable income, it would expressly have indicated that fact.

Thus, similarly it has frequently been ruled that "taxable corporate net income" and "earnings and profits" are not the same. Items, which do not constitute taxable income to the corporation, may, nevertheless, constitute a part of earnings and profits, taxable as dividends to stockholders, as, for example, interest upon obligations issued by a state, all income exempted by statute, and dividends of domestic corporations. On the other hand, some extraordinary expenses, excessive charitable contributions, federal taxes, and local benefit taxes, not deductible in computing taxable net income, may be deducted in determining earnings and profits. Depletion reserve, based on discovery value substantially in excess of costs, may not be deducted from earnings and profits, in computing taxable dividends, but may be deductible in determining taxable net income. *Weyerhaeuser v. Commissioner*, 33 B. T. A. 594, 597; *Ayer v. Commissioner*, 12 B. T. A. 284, 287; see also Regulations 101, Art. 115-3 (Appendix, *infra*).

The authorities cited by taxpayer, where not overruled, are not in point. *Houston Brothers Co. v. Commissioner*, 21 B. T. A. 804 (Br. 8-9), has been overruled in *Commissioner v. S. A. Woods Mach. Co.*,

57 F. 2d 635, 636, in which the Circuit Court of Appeals for the First Circuit said:

The view taken by the Board of Tax Appeals (see *Houston Brothers Co. v. Commissioner*, 21 B. T. A. 804) presses accounting theory too far in disregard of plain facts. It is not supported by any decision which has come to our attention except those of the Board.

To the same effect is the decision in *Commissioner v. Boca Ceiga Development Co.*, 66 F. 2d 1004, 1005 (C. C. A. 3d), where the court also pointed out that the Board of Tax Appeals no longer follows its own ruling in the *Houston* case.

The decision of the Board of Tax Appeals in *Liberty Agency Co. v. Commissioner*, 5 B. T. A. 778 (Br. 9), involved an issue of taxable income, not a determination of earnings and profits. Finally, in *Commissioner v. Inland Finance Co.*, 63 F. 2d 886 (C. C. A. 9th), the facts as well as the issue decided are readily distinguishable from those at bar. There, subscribers to the original issue of the taxpayer corporation's stock made payments on account of installment subscriptions, but had failed to complete payments in full. It appeared that the agreements were subject to reinstatement at any time at the option of the subscriber and that some of the agreements had been reinstated. The issue was whether these payments on account were taxable income to the corporation. This Court held, first, that the payments on account had not become the absolute property of the taxpayer without qualification or condition,

since the agreements were subject to reinstatement at any time at the option of the subscriber. This Court further held that the forfeited payments did not constitute gain for the purpose of determining *taxable* income. However, as already discussed, "taxable income" and "earnings and profits" are entirely distinct conceptions under the statute and the cited case therefore constitutes no holding, whatsoever, either on the facts or law at bar. Certainly, there was no closed transaction, as in the instant case.

CONCLUSION

The sum of \$20,839 realized by the Murphey Company upon the redemption of all of its preferred stock is in every real sense a gain and forms part of its earnings and profits; the stock has been cancelled and retired and the transaction is completed; if a tax is ever to be imposed, it must be imposed now. No formal distinction should be supported, which will open the door to large evasion of sharing the tax burden with others, inherently in the same position. The decision below, so far as appealed from, should in all respects be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, JR.

Assistant Attorney General.

SEWALL KEY,

ROBERT N. ANDERSON,

I. HENRY KUTZ,

Special Assistants to the Attorney General.

DECEMBER, 1943.

APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term “dividend” when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

* * * * *

(g) *Redemption of Stock.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 115-1. *Dividends.*—The term “dividend” for the purpose of Title I (except when

used in sections 203 (a) (3) and 207 (c) (1) thereof) comprises any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of either—

(1) earnings or profits accumulated since February 28, 1913, or

(2) earnings or profits of the taxable year computed without regard to the amount of the earnings or profits (whether of such year or accumulated since February 28, 1913) at the time the distribution was made.

* * * * *

ART. 115-3. *Earnings or profits.*—In determining the amount of earnings or profits (whether of the taxable year, or accumulated since February 28, 1913, or accumulated prior to March 1, 1913) due consideration must be given to the facts, and mere bookkeeping entries increasing or decreasing surplus will not be conclusive. Among the items entering into the computation of corporate earnings or profits for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22 (a) of the Act or corresponding provisions of prior Acts. Gains and losses within the purview of section 112 or corresponding provisions of prior Acts are brought into the earnings and profits at the time and to the extent such gains and losses are recognized under that section. Interest on State bonds and certain other obligations, although not taxable when received by a corporation, is taxable to the same extent as other dividends when distributed to shareholders in the form of dividends.

* * * * *

ART 115-9. *Distribution in redemption or cancellation of stock taxable as a dividend.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. A bona fide distribution in complete cancellation or redemption of all of the stock of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend. If a distribution is made pursuant to a corporate resolution reciting that the distribution is made in liquidation of the corporation, and the corporation is completely

liquidated and dissolved within one year after the distribution, the distribution will not be considered essentially equivalent to the distribution of a taxable dividend; in all other cases the facts and circumstances should be reported to the Commissioner for his determination whether the distribution, or any part thereof, is essentially equivalent to the distribution of a taxable dividend.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED NATIONAL CORPORATION, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW FROM THE TAX COURT OF
THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

ROGER L. SHIDLER and
HARROUN & SHIDLER,
Attorneys for Petitioner.

410 American Building,
Seattle, Washington.

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UNITED NATIONAL CORPORATION, a corporation,

Petitioner,

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Respondent.

No. 10556

ON PETITION FOR REVIEW FROM THE TAX COURT OF
THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The respondent in his brief makes the statement that, should petitioner prevail in its contention in this cause, then the field would be opened to a means of tax evasion. This statement is wholly without foundation. Where a shareholder receives a distribution upon redemption of his shares, similar to the distribution in issue here, the amount received, if in excess of the cost of his stock, is a capital gain and taxable as such. When a non-taxable distribution is made without the redemption of stock, the stockholder's cost is reduced by the amount of the distribution (see Sec. 115(d) of the Internal Revenue Code). Upon a subsequent sale at a price in excess of cost, he is subject to income tax on the gain. The incidence of the tax is not

avoided, it is merely postponed. So in the case of the petitioner, if it had received more than its cost, upon the redemption of the shares of Murphey Company held by it, the excess would be subject to tax. When the shareholder, upon redemption of his shares, receives less than the cost of his stock, no equitable considerations force the imposition of a tax.

Respondent, at page 9 of his brief, says:

"This is not a case of a return to preferred stockholders of capital contributed by them, but distribution to a common stockholder of a fund over and above any sum contributed or invested by it."

This is a gratuitous statement not supported by the record. The fact is that the petitioner, upon redemption of its shares, received less than the cost of the shares to it, as respondent well knows.

It is said, in respondent's brief, that "Indeed it is clearly inferable from the conceded findings that Murphey Company repurchased the preferred stock, when and as it did, in order to obtain this gain" (p. 9). No such inference can be drawn. The actual reason for the redemption of the preferred shares is set forth in the findings of fact:

"* * * During the early 1930's, the business substantially decreased. As a result, all of the preferred stock was retired before and during 1932." (R. 29)

The respondent says that The Tax Court found as a fact that the sum of \$20,389 did not form a part of either, "capital paid in for stock or paid in surplus—cash paid in." He might have gone further and stated that The Tax Court found as a fact, the \$20,389 was

a part of the earned surplus. The status of the \$20,389, as earned surplus or paid in surplus, is not properly a finding of fact. It is a conclusion of law, and, indeed, the ultimate question to be decided in this cause—whether the \$20,389 is a part of the earnings or profits. If it is a part of the earnings or profits, it is, of course, earned surplus. If it is not a part of the earnings or profits, it is not earned surplus but paid-in capital. The findings of The Tax Court set forth the stipulation of the parties as to the point involved in this cause (R. 28-29). In view of the stipulation, we do not believe it meet or profitable to go into any extended discussion as to what are findings of fact and what are conclusions of law. The mention of this point by respondent merely confuses the issue and the record. Petitioner has obeyed the mandate of the Rules of Civil Procedure to bring up only so much of the record as to show clearly the point involved. The point can and should be decided without reference to technicalities of the record.

The respondent states that the average man would readily agree that an actual profit was realized. He then goes on to state that:

“At the moment that the last share of the preferred stock was retired, and the capital of the company, which the preferred stock represented, was reduced by its cancellation, the amount of \$20,389 became the property of Murphey Company for the benefit of its sole common stockholders, the taxpayer, subject to no liabilities of any kind.” (pp. 9-10)

The Murphey Company realized no profit when it redeemed the shares of its preferred stock. It got

nothing. Indeed, it actually had less assets after the redemption than before. It is entirely conceivable that the Murphey Company had assets of less worth than the par value of its shares remaining after the redemption of its preferred stock. The fallacy in respondent's reasoning is that he assumes that par value represents actual value, and that the outstanding preferred shares represented a debt owing by Murphey Company.

Petitioner's position is clear cut and in accord with sound principles. It is simply this: when Murphey Company redeemed its capital stock for less than its par value, the difference between par and the amount paid was properly credited to capital surplus. When such capital surplus is distributed, the shareholders charge the amount of the distribution received against the cost of their shares. If in excess of the cost of their shares, the balance is taxable as a capital gain. The earnings or profits of the corporation are not affected by the redemption of its own shares. As pointed out, no principle of tax avoidance is involved. If the shareholder, upon redemption of his shares, received more than he paid for them, he is taxed on the gain.

THE CASES CITED BY RESPONDENT

Respondent cites a statement from *Cummings v. Commissioner* (C.C.A. 1) 73 F.(2d) 477, in support of his argument. The statement is as follows:

“If these funds, however derived, belonged to the Company when received, they would go to increase its surplus, and it cannot be seriously argued that the *surplus funds in the hands of the company over and above its stock liability are not the earnings or profits contemplated by the section.*”

That part of the statement in italics is ill-considered and not necessary to the decision. An analysis of the statement will show that, standing by itself, it is wholly inaccurate. Paid in surplus, surplus arising from the reduction of capital stock, and amounts paid in on capital stock subscription contracts and forfeited to the corporation, all give rise to surplus funds in the hands of the corporation over and above its stock liability. Yet in none of such cases do the funds represent earnings or profits of the corporation.

The respondent contends that in *Morainville v. Commissioner*, 46 B.T.A. 753, the Board of Tax Appeals sustained the Commissioner's contention on facts closely similar to those at bar. An examination of the case will reveal that it was actually decided on the ground that the petitioner failed to prove that the earnings or profits were insufficient to pay the dividends. The following quotation from the decision makes that clear:

“but the analysis (of surplus) is too superficial to make it clear that these adjustments prove that the earnings and profits are less than enough

to support the 1936 and 1937 dividends of series 'B' shares."

Moreover, the quotation from the decision cited in respondent's brief makes it clear that the basis of the decision was not what respondent contends that it was: "It is entirely possible that the amount is within earnings and profits from which taxable dividends may be distributed." This language itself shows that the statement was *obiter dictum*.

In his discussion of *Weingarten v. Commissioner*, 44 B.T.A. 798, respondent makes the statement that the \$30.00 premium over par value paid by Murphey Company in one transaction where preferred stock was redeemed, was "undoubtedly charged to earnings or profits." This is a violent assumption particularly in view of the sworn statement in petitioner's petition below that "the debit or credit (arising from the redemption of preferred stock) was charged or credited to capital surplus on the books of Murphey, Favre & Company" (R. 9). The holding in the *Weingarten* case has nothing to do with the point at issue here. In that case, the corporation actually paid out a certain sum in excess of par value to shareholders. The sum so paid out would necessarily come out of earnings or profits as the distribution is considered in the nature of a dividend to the extent that the distribution exceeds par value. Here the Murphey Company, upon redemption of its shares of preferred stock, received nothing. It does not necessarily or at all follow, that, because a charge against earnings or profits is sustained where a premium is paid for preferred stock purchased and cancelled, that a corre-

sponding credit to earnings or profits results when the stock is purchased at a discount and cancelled. The two situations are entirely different.

Golden State T. and R. Corp. v. Commissioner (C.C.A. 9) 125 F.(2d) 641, has no bearing on the case at bar. There was no redemption of shares involved in that case. There was a dividend distributed by a subsidiary corporation out of its earnings. The distribution was represented by shares of the parent corporation's stock. The decision was right on the facts. The quotation from the case set forth in respondent's brief must be read in the light of the facts there involved.

CONCLUSION

It is submitted that The Tax Court of the United States was in error in holding that the earnings or profits of Murphey were increased by the repurchase of its preferred shares at less than their par value.

Respectfully submitted,

ROGER L. SHIDLER and
HARROUN & SHIDLER,
Attorneys for Petitioner.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED NATIONAL CORPORATION, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW FROM THE TAX COURT OF
THE UNITED STATES

BRIEF OF AMICUS CURIAE

SULLIVAN & CROMWELL,
48 Wall Street,
New York, New York.
Amicus Curiae

EUSTACE SELIGMAN,
WILLIAM F. KENNEDY,
Of Counsel.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED NATIONAL CORPORATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10556

ON PETITION FOR REVIEW FROM THE TAX COURT OF
THE UNITED STATES

BRIEF OF *AMICUS CURIAE*

QUESTION PRESENTED

This is a petition for review, pursuant to Sections 1141 and 1142 of the Internal Revenue Code, of a decision of The Tax Court of the United States herein entered June 15, 1943 (R. 43-47).

There is no controversy between the parties as to the facts; the only question presented to this Court is a question of law, to wit: When a corporation repurchases shares of its own stock for less than their par value and retires the shares, does the amount by which the par value exceeds the repurchase price constitute earnings or profits to the corporation?

The petitioner owned all the common stock of Murphey, Favre & Co., a corporation. Murphey, Favre & Co. in 1929 to 1932 repurchased its outstanding preferred stock at \$20,389 less than the par value thereof, and the shares were retired or cancelled. In 1938, the petitioner surrendered for cancellation 75% of the common stock of Murphey, Favre & Co. and received therefor 75% of the assets of that company. The other 25% of the common stock was later sold.

The Tax Court of the United States held that, pursuant to Section 115(a) and (g) of the Revenue Act of 1938, the \$20,389 by which the par value of the retired preferred stock exceeded the repurchase price of those shares constituted earnings or profits of the corporation, and increased accordingly the portion of the amount distributed by Murphey, Favre & Co. to the petitioner which was to be taxed to the petitioner as a dividend rather than as a distribution of capital.

SUMMARY OF ARGUMENT

It is the contention of *amicus curiae* that said \$20,389 constituted capital surplus rather than earnings or profits of Murphey, Favre & Co., and that therefore any distribution thereof constituted a distribution of capital and not a dividend.

ASSIGNMENTS OF ERROR

The petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The determination by The Tax Court of the United States that the sum of \$20,389, representing the discount on the redemption of the preferred stock of Murphey,

Favre & Co., was a part of the accumulated earnings or profits of Murphey, Favre & Co. and that petitioner received taxable income in any amount greater than \$88,120.80 upon the partial liquidation of Murphey, Favre & Co. on the redemption of 750 shares of stock of Murphey, Favre & Co. held by petitioner.

ARGUMENT

Where a corporation repurchases shares of its own stock for less than their par value and retires the shares, the amount by which the par value exceeds the repurchase price is not a part of its earnings or profits.

The decision of The Tax Court below holding otherwise (1) is in direct conflict with the express provisions of the applicable statute and all other court decisions interpreting them, (2) runs counter to the long established practice of the Treasury Department in administering the statute, (3) is inconsistent with the legislative policy which Congress evidenced in the Second Revenue Act of 1940 (applicable retroactively to prior Acts), and (4) is directly opposed to well established principles of sound accounting.

Introduction

As forcefully brought out by Paul in his *Studies in Federal Taxation*, (Second Series, p. 149) it is important to recognize at the outset that Congress has not seen fit to tax as a dividend every distribution by a corporation from every source whatever. Since 1916, Congress has limited "its broad constitutional right to tax by establishing a new statutory test of taxability of corporate distributions to stockholders,—the test of the *source in the corporation of the distribution*, more particularly, the test of whether the

distribution was out of 'earnings or profits' " (Paul, pp. 150-151). Thus a distribution of a capital surplus resulting from capital rather than revenue transactions, is not a dividend within the meaning of the tax law; such a distribution is governed by the provisions of Section 115(d) of the Revenue Acts of 1938 and other Revenue Acts rather than Section 115(a) or (g), and is applied against and reduces the stockholder's cost basis for his stock. Where a shareholder surrenders his interest in a corporation and leaves part of the capital which he originally contributed, the corporation has a surplus of capital but not earnings or profits; the amount is properly accounted for as capital surplus and not earned surplus.

(1) The purchase and retirement of shares of its own stock did not give rise either to income or to earnings or profits to Murphey, Favre & Co.

Under § 115(a) of the Revenue Act of 1938 (and the corresponding provision of prior Revenue Acts back to the Act of 1916) a dividend has been defined as a distribution by a corporation out of its "earnings or profits". The expression "earnings or profits" corresponds to the accounting concept of earned surplus, as opposed to capital and capital surplus. For over twenty-five years since it first appeared in the Revenue Act of 1916, apart from the decision below in the present proceeding, the expression has consistently been interpreted to mean the excess of the income receipts (as distinguished from the capital receipts) of a corporation over its income deductions (as distinguished from its capital expenditures).

The present case is concerned only with the first half of the formula, *i.e.* with the *receipts* which enter into the

computation of "earnings or profits". It is important to observe this fact. For admittedly taxable *net* income is not the same as "earnings or profits" because of certain express statutory exclusions from gross income and limitations on deductions of expenditures (contained principally in § 22(b) and § 23 of the Revenue Acts) which enter into the computation of taxable net income and do not enter into the computation of "earnings or profits". But that is irrelevant. The significant point is that all receipts which are included in the computation of "earnings or profits" are also included in *gross* income as defined in § 22(a) of the Revenue Acts.

For "gross income" is defined in § 22(a) of the Revenue Act of 1938 (and *haec verba* in prior Revenue Acts back at least to the Revenue Act of 1928—which includes all Revenue Acts here involved) as follows:

"(a) GENERAL DEFINITION.—'Gross income' includes gains, *profits*, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or *profit*, or gains or *profits* and income derived from any source whatever. * * *" (Italics added)

"Profits" are expressly included. And it is submitted that the term "earnings" does not encompass more than the sweepingly broad balance of the definition of gross income which remains when we exclude the term "profits". The Supreme Court has said that in § 22(a) Congress intended

to use its powers of income taxation to their full measure. *Helvering v. Stuart*, 317 U. S. 154, at 169, 63 S. Ct. 140, and cases there cited. In short the general statutory concept of "gross income" as defined in § 22(a) obviously includes all receipts entering into the computation of earnings or profits.

The Tax Court in the present proceeding said:

"The Murphey Co. realized a gain upon the redemption of all of its preferred stock. Of course that gain was not a taxable gain. But we think it must be considered as constituting part of the 'earnings or profits' accumulated after February 28, 1913."

But if there was a gain to the corporation, as distinguished from a capital transaction involving a mere reshuffling of the proprietary interests in the corporation, it obviously would have resulted in a taxable gain. § 22(a) includes in taxable gross income "gains derived from any source whatever" except as specifically excluded elsewhere in § 22, and there is no such exclusion here. It being obvious that the corporation had no taxable gross income from the transactions in question because it had no "gains or profits [or] income derived from any source whatever", it is equally clear that a corporation which has no "gains, profits [or] income from any source whatever" in respect of given transactions has no earnings or profits from those transactions. A decision that there is no taxable "gross income" within the meaning of § 22(a), is necessarily a decision that there are no earnings or profits within the meaning of § 115(a).

It has never been held that a corporation realized income from the mere retirement of its own shares. This has

universally been regarded as a capital transaction and not a revenue transaction. As has just been pointed out, even the Tax Court in the decision involved in this appeal considered that point obvious.

Similarly, where subscribers to capital stock, after making partial payment on their subscriptions, have defaulted and the stock subscribed for together with the payments already made has been declared forfeited, the distinction between capital receipts and income has been carefully preserved and the courts have consistently held that the defaulted payments do not constitute income to the corporation even though the persons making the payments have ceased to have any interest in the corporation. For example, the Board of Tax Appeals, as long ago as 1926, in *Illinois Rural Credit Assn.*, 3 BTA 1178 (Acq.), held that:

“The payments on account of the stock subscriptions, at the time they were made, were undoubtedly capital payments, being made to provide capital for the corporation, and were in its hands capital receipts as distinguished from income. The fact that payments were made in instalments and stock was never issued for such payments, because they were not made to the full amount of the subscriptions, does not alter their character.”

See also, *Industrial Loan & Investment Co.*, 17 BTA 1328 (Acq.); *Inland Finance Co.*, 23 BTA 199, affd. by C. C. A. 9 at 63 F. (2d) 886; *Realty Bond & Mtg. Co. v. U. S.* (Ct. Cls.), 16 F. Supp. 771; and *Terminal Grain Corp. v. U. S.* (D. C. Iowa), 1938 CCH Fed. Tax Serv., par. 9181, 22 A. F. T. R. 1290.

Going further, it has now been authoritatively settled by the Supreme Court that even though a corporation sub-

sequently resells shares of its own stock which it has purchased, rather than retires or cancels them, the transaction still retains its character as a capital transaction not giving rise to income under § 22(a) of the Revenue Acts, at least in the case of transactions in 1933 and prior years (which are the years in which the transactions involved in the present proceeding occurred). *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, 59 S. Ct. 423; *First Chrold Corp. v. Commissioner*, 306 U. S. 117, 59 S. Ct. 427. The Supreme Court decision rested upon the Commissioner's regulation in force during this period providing that (Reg. 74, Art. 66):

"If . . . the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered *a capital transaction and the proceeds of such sale will be treated as capital* and will not constitute income of the corporation. *A corporation realizes no gain or loss from the purchase or sale of its own stock.*" (Italics added.)

Since the reacquisition and retirement of shares of its own stock by Murphey, Favre & Co. during the years 1929 to 1932 here involved did not give rise to any gross income as defined in § 22(a), it follows irrefutably that they did not give rise to earnings or profits (which encompass nothing not included in gross income as defined in § 22(a) of the applicable Revenue Acts). Since such transactions were capital transactions and the proceeds thereof capital and not income of the corporation, by the same token they did not constitute earnings or profits, for capital is just as surely the antithesis of earnings and profits as it is of income.

(2) The position of the Commissioner in this case runs counter to the long established practice of the Treasury Department.

The principle that the repurchase by a corporation of its own shares at a price below the amount originally paid in for them does not give rise to earnings or profits any more than income was expressly recognized by the Commissioner as long ago as 1923, in *IT 1802*, II-2 CB 267 (1923), wherein it was said:

“Accordingly, when the corporation purchased its own stock at a price below the paid in value of the shares it acquired, the amount paid out by the corporation represented a return of paid in capital, *and the difference between the amount paid by the corporation and the paid in value of the shares represented paid in surplus, and earned surplus was not affected by the transaction.*” (Italics added.)

This ruling is one of the thirty-one Treasury rulings and regulations, and decisions of the Board of Tax Appeals, cited by the Supreme Court in the *Reynolds* case, *supra*, at page 8, establishing that a transaction by a corporation in its own shares had been uniformly regarded as a capital transaction with respect to each of the Revenue Acts from that of 1913 through that of 1932.

(3) The decision of the Tax Court below is inconsistent with the legislative policy which Congress evidenced in the Second Revenue Act of 1940.

In the Second Revenue Act of 1940 Congress enacted the war-time excess profits tax, many of the provisions of which depend upon the earnings or profits of the corpora-

tion subject to the tax. In the same Act, and in view of the added importance which the concept of earnings or profits accordingly assumed, Congress clarified in certain respects the scope of the expression by the addition of §§ 115(1) and (m) to the Internal Revenue Code and *to all prior Revenue Acts*. These provisions thus reflect certain fundamental legislative policies with regard to the application of the concept of "earnings or profits".

The additional provisions are significant here because in them Congress evidenced an intention (a) that in general the receipts entering into the computation of earnings or profits conform with those entering into the computation of taxable gross income except where explicit statutory provisions require otherwise (House Com. Rep. on § 401 of the Second Revenue Bill of 1940); and, (b) that, as in the computation of net income, earnings or profits be computed in accordance with the law applicable to the year in which the relevant transactions giving rise thereto took place (§ 115(1), in at least three places, stressing that computations are to be made under the law applicable to the year in which the transaction giving rise to the earnings took place).

The decision of the Tax Court below runs directly counter to the legislative policy here enunciated; although there is nothing in the concept of earnings or profits that requires such a result, it goes out of its way to make the receipts entering into the computation of earnings or profits something different from those entering into the computation of gross income. And it ignores the decisions of the Supreme Court in the *Reynolds* and *Chrold* cases, *supra*, at page 8, which have established with finality the principles of law applicable to the tax years in which took place the redemptions of stock here involved.

- (4) It is contrary to well established principles of accounting to hold that the mere purchase and retirement of a corporation's own shares gives rise either to income or to earnings or profits to it.**

The House Ways and Means Committee, in its report on Section 401 of the Second Revenue Act of 1940, took occasion to stress the importance in this connection of following sound accounting practice, pointing out that:

“While prescribing rules for certain cases * * * section 401 contemplates that consistently with these rules the computation shall be made conformably to the best accounting practice.”

Tested by accepted accounting principles, it is clear that the mere purchase and retirement of a corporation's own shares does not result in earnings or profits to the corporation.

On this point the Securities and Exchange Commission has ruled as follows:

“It is recognized that when capital stock is re-acquired and retired any surplus arising therefrom is capital and should be accounted for as such and that the full proceeds of any subsequent issue should also be treated as capital. Transactions of this nature do not result in corporate profits or in earned surplus.” (SEC Accounting Series Release No. 6)

Likewise, the Committee on Accounting Procedure of the American Institute of Accountants, in its Accounting Research Bulletin of September 1939, has said:

“Apparently there is general agreement that the difference between the purchase price and the stated

value of a corporation's common stock purchased and retired should be reflected in capital surplus. Your committee believes that while the net asset value of the shares of common stock outstanding in the hands of the public may be increased or decreased by such purchase and retirement, such transactions relate to the capital of the corporation and do not give rise to corporate profits or losses * * *." (This rule also appears in the *Journal of Accountancy*, Vol. LXV, pp. 417-418. To the same effect, see also *Kester, Accounting Theory and Practice*, 369; *Montgomery, Auditing Theory and Practice*, 402; *Sunley & Pinkerton, Corporation Accounting*, 121; *Streightoff, Advanced Accounting*, 19.)

The Circuit Court of Appeals for the Third Circuit aptly described the situation in the *Chrold Corporation* case, subsequently affirmed by the Supreme Court, *supra*, at page 8, when it said:

"A corporation which purchased shares of its own stock for less than the sum for which it was issued and then retires the stock may have been advantaged by the transaction in a sense but the real gain is by its remaining stockholders and not by the corporation as such. The change effected is merely a change in the corporate structure. The Treasury regulations so stated and the Courts have so ruled." (97 F. (2d) 22.)

The stockholders of a corporation are its proprietors. It exists to make earnings or profits for them. It cannot profit at their expense. Whenever a corporation issues additional shares or retires shares, the relative proprietary interests of the remaining stockholders are altered; but the corporation does not profit any more than it would if one stockholder were to buy out the shares of another stock-

holder or if the rights of the shareholders *inter se* were otherwise altered. Such transactions have always been regarded as capital transactions or transactions affecting the proprietary shares in the enterprise, as opposed to revenue transactions.

Admittedly the mere fact that shares of its stock are involved in a transaction does not preclude the realization of a profit by a corporation. For example, a corporation may have a gain when it utilizes assets which have appreciated in value to repurchase shares of its own stock; but in such a case the profit is in respect of the assets so utilized and not in respect of the retirement of its stock. For all authorities are agreed that the mere retirement by a corporation of shares of its own stock for cash does not give rise to income or to earnings or profits to it. *Rankin, Income Tax Aspects of a Corporation's Dealings in its Own Shares*, 89 U. of Pa. L. Rev. 934, and numerous authorities there collected.

CONCLUSION

It is submitted that The Tax Court of the United States was in error in holding that the earnings or profits of Murphey, Favre & Co. were increased by that corporation's repurchase, for less than their par value, and retirement of shares of its own stock.

Respectfully submitted,

SULLIVAN & CROMWELL,
48 Wall Street,
New York, New York
Amicus Curiae

EUSTACE SELIGMAN
WILLIAM F. KENNEDY
Of Counsel

No. 10620

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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PAUL D. O'BRIEN,
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No. 10620

United States
Circuit Court of Appeals

For the Ninth Circuit.

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. Civ. 918

EDWARD SWIDERSKI,

Plaintiff,

vs.

ALLEN L. MOODENBAUGH, improperly im-
pleaded as OWEN G. MOODENBAUGH,
Defendant.

AGREED STATEMENT TO CONSTITUTE
RECORD ON APPEAL

This is a personal injury action by plaintiff against defendant for the sum of \$977.92 special damages and \$35,000.00 general damages. The parties agreed upon a pre-trial order which was entered by the court on June 23, 1942. This order sets forth the basis of jurisdiction, the agreed facts and the issues of law and fact. There is only one point being raised upon this appeal and following are such portions of the pre-trial order as, in the opinion of both parties, are sufficient to acquaint the Appellate Court with the substance of the pleadings, admitted facts and issues.

“The following statement of facts was and is agreed upon by the parties and agreed to by the Court:

AGREED FACTS

I.

The correct name of the defendant in this cause is Allen L. Moodenbaugh.

II.

Plaintiff is a resident, citizen and inhabitant of Cook County, Illinois, and defendant is a resident, citizen and inhabitant of Multnomah County, Oregon, and the amount in controversy, exclusive of costs, exceeds the sum of \$3,000.00.

III.

At all times involved herein Lake Road has been and is a public thoroughfare and highway running in a general easterly and westerly direction past 28th Street, within the incorporated limits of the City of Milwaukie, Clackamas County, Oregon.

IV.

On or about July 22, 1941, at about 11:45 P.M. plaintiff was driving an automobile in an easterly direction on Lake Road in Milwaukie, Clackamas County, Oregon, and defendant was driving an automobile in a westerly direction on said road at said time and place; that at a point a short distance east of the intersection of 28th Street with said Lake Road, said two automobiles collided.

V.

As a result of said accident plaintiff received some injuries, defendant conceding that plaintiff sus-

tained an initial concussion of the brain, at least a cut nose, some injury to four teeth, cut tongue, a broken left jaw, and lacerations of his chest and foot. Otherwise defendant denies plaintiff's claims of injury.

VI.

It is further agreed that as a result of said accident plaintiff sustained some loss by way of medical, hospital and nurse expense, the nature and amount, however, of same being in issue. Likewise, it is conceded that plaintiff at the time of the accident was engaged in work as a bottler at a soft drink manufacturing company in Portland, said work being semi-seasonal in nature, and that he sustained some loss of wages, but the relation between plaintiff's disabilities and said loss, and the amount thereof, are in issue.

ISSUES TO BE DETERMINED

I.

Plaintiff charges that defendant was careless, reckless and negligent in the following particulars:

1. That defendant failed to drive his car on the right half of the paved portion of the highway;
2. That defendant drove his car on the left half of the paved portion of the highway;
3. That defendant drove his automobile at an excessive rate of speed;
4. That defendant failed to keep a proper lookout for other automobiles or traffic and especially traffic coming toward him.

5. That defendant failed to pay attention to his driving;

6. That defendant failed to keep his automobile under control;

7. That defendant failed to pass plaintiff by giving plaintiff at least half of the traveled portion of the roadway;

8. That defendant turned his car into plaintiff's automobile immediately preceding the collision;

9. That defendant failed to bring his automobile to a stop;

10. That defendant drove his automobile with improper lights, to-wit: with only one light.

Defendant denies that he was negligent in any particular as charged or that any alleged act or omission as charged was a proximate cause of the accident.

II.

With respect to the allegations in subdivision 3, paragraph I *supra*, it is agreed by the parties that the designated speed at the place of accident was 25 miles per hour. It is the contention of plaintiff that defendant was driving in excess of 25 miles per hour and that under Section 115-320 O.C.L.A. the fact that defendant was driving in excess of 25 miles per hour, if proved, is *prima facie* evidence of negligence on the part of defendant. It is the position of defendant that he was not violating the basic rule and even if he was driving in excess of 25 miles per hour that would not be *prima facie* evidence of negligence under the doctrine of *Zeek vs. Bicknell*, 150 Ore. 167, which is to the effect

that the statutory designated speeds are not relevant in negligence cases and that it is improper to submit to the jury the designated speed.

III.

Plaintiff contends that as the direct and proximate result of said accident he was seriously, painfully and permanently injured and suffered the following injuries, to-wit: a severe concussion of the brain, a badly cut and broken nose, loss of four teeth, a severely cut tongue, a broken left jaw, a severe back injury, deep cut holes in his chest and foot, and numerous abraisions, contusions, sprains and muscle injuries upon numerous parts of his body, a nervous condition and a possible skull fracture.

IV.

Plaintiff further charges that by reason of said accident he necessarily incurred expenses as follows:

Hospital expenses	\$119.92
Nurses' hire	78.00
Medical services	200.00
Ambulance	10.00
Loss of wages	570.00
<hr/>	
Total	\$977.92

V.

Further plaintiff contends that as a result of said accident he has suffered great pain and permanent injuries and will incur further expenses for medical and dental services in a substantial sum and

that plaintiff has been damaged in the sum of \$35,000.00 general damages.

VI.

Except as otherwise admitted in paragraphs V and VI, page 2, *supra*, defendant denies the charges contained in paragraphs III, IV, and V, page 4, *supra*, and plaintiff will be placed on proof in regard thereto.

VII.

By the terms of the order of this court dated March 23, 1942, should plaintiff recover a judgment from defendant in excess of \$5,000.00, plaintiff will be required to accept a remittitur of such damages, if any, as may exceed the sum of \$5,000.00.

VIII.

Defendant, on his part, contends that plaintiff was careless, negligent and reckless in the following particulars, to-wit:

1. Plaintiff failed to drive on his right half of the highway, but instead drove upon his left half thereof;

2. Plaintiff failed to drive as closely as practicable to his right half of the highway;

3. Plaintiff failed to pass defendant by giving defendant at least half of the traveled portion of the roadway;

4. Plaintiff failed to keep his automobile under control or to turn same aside in time to avoid collision with defendant's automobile;

5. Plaintiff was proceeding at a rate of speed

which was unreasonable and excessive under the circumstances;

6. Plaintiff failed to maintain a proper or any lookout for vehicles approaching from the opposite direction;

7. Although said accident occurred at about 11:45 o'clock P.M. plaintiff failed to have the headlights on his automobile lighted until immediately before said collision occurred.

IX.

Defendant further contends that the aforesaid alleged negligence of plaintiff was the proximate cause of said collision and of such injuries as plaintiff may have sustained in said accident.

X.

With respect to the charges of contributory negligence made by defendant as above stated, plaintiff denies that he was negligent in any particular as contended for by defendant or that any of said alleged acts or omissions were a proximate cause of the accident."

In connection with the issue of law in paragraph II of the issues set forth in the pretrial order and which appears on page 3 of this agreed statement, the following occurred. Defendant testified in one of the depositions that was adduced as evidence, that immediately preceding the collision he was driving his automobile at about 35 miles per hour, and it is agreed that the designated speed of Lake Road according to Section 115-320 of Oregon Com-

piled Laws Annotated is 25 miles per hour. Plaintiff had submitted no requested instructions, and, in its instructions on the question of negligence and contributory negligence, the court gave the usual instructions as to the effect if the jury found for or against plaintiff or defendant on any of the issues of negligence or contributory negligence, including the issue of excessive speed. The court made no reference to the designated speed at the place of the collision and at the conclusion of the court's instructions the following occurred.

"Mr. Lenske: I except to that portion of the instructions relating to speed and ask the court to instruct that the designated speed at the place of the collision, under the Oregon Statute, is twenty-five miles per hour, and that if either of the parties was driving his automobile at a greater speed than twenty-five miles per hour, such fact is prima facie evidence of negligence on the part of such driver; which, however, is not conclusive and can be overcome by other evidence. That is the only exception I have.

"The Court: Exception is granted."

Thereupon a verdict was returned by the jury for the defendant and on July 15, 1942, the court entered the following

JUDGMENT

"The above action came on regularly for trial on Tuesday, June 23, 1942, at 10:00 o'clock A.M. Plaintiff appeared in person and by and through

Reuben G. Lenske, his attorney. Defendant appeared by and through James C. Dezendorf and Dey, Hampson & Nelson, his attorneys. The jury was duly empaneled and sworn to try the issues of the case, after which opening statements of counsel were made. Witnesses for plaintiff and defendant were thereafter sworn and testified. The evidence was completed at 8:30 P.M. on June 23, 1942, at which time an adjournment was taken until Wednesday, June 24, 1942, at 9:30 A.M. Arguments of counsel to the jury were made on June 24, 1942, after which the Court instructed the jury. The jury retired to deliberate on a verdict at 12:15 P.M. on June 24, 1942, and thereafter at approximately 3:00 P.M. returned into Court a verdict in words and figures as follows, to wit: (Formal parts omitted).

‘We, the jury, duly empaneled and sworn to try the above entitled cause, do find our verdict in favor of the defendant and against the plaintiff.

Dated June 24, 1942.

ROBERT S. SMITH,
Foreman.’

The verdict so returned was duly received, filed and entered and in conformity therewith, the Court being now fully advised, it is hereby

Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, and that the same be and it hereby is dismissed; and it is further Or-

dered, Adjudged and Decreed that defendant have judgment against plaintiff for his costs and disbursements herein to be taxed.

Dated This 15th day of July, 1942.

JAMES ALGER FEE,
Judge."

Thereafter on August 14, 1942, plaintiff duly served and filed the following

NOTICE OF APPEAL

"Notice is hereby given that Edward Swiderski, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about July 15, 1942, in favor of defendant and against plaintiff.

REUBEN G. LENSKE,
Attorney for Edward Swiderski, 825 Yeon Building,
Portland, Oregon."

"U. S. District Court
District of Oregon
Filed August 14, 1942
G. H. Marsh, Clerk."

The sole question to be determined on this appeal is whether the court committed reversible error in not instructing the jury along the lines suggested

by counsel for plaintiff-appellant in his exception above set forth.

REUBEN G. LENSKE,

Attorney for plaintiff-appellant.

JAMES C. DYMONT,

Of attorneys for defendant-appellee.

The foregoing agreed statement to constitute record on appeal is hereby approved in accordance with Rule 76. F.R.C.P. upon presentation.

November 27, 1943.

JAMES ALGER FEE,

Judge.

[Endorsed]: Filed Nov. 27, 1943.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing agreed statement signed by the attorneys for the respective parties and approved by Judge James Alger Fee, which said agreed statement consists of 8 pages numbered from one to eight both inclusive constitutes the record on appeal in a cause therein numbered Civil 918 wherein Edward Swiderski is plaintiff and Allen L. Moodenbaugh is defendant, and I hereby further certify that said agreed state-

ment contains a true copy of the judgment in the said cause and a true copy of the notice of appeal in said cause with its filing date.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of November, 1943.

[Seal] LOWELL MUNDORFF,
Clerk.

[Endorsed]: No. 10620. United States Circuit Court of Appeals for the Ninth Circuit. Edward Swiderski, Appellant, vs. Allen L. Moodenbaugh, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 29, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10620

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

STATEMENT OF POINTS BY APPELLANT

The following are the points upon which appellant intends to rely in the above appeal, to wit:

1. Under Chapter 458 of the 1941 Oregon Session Laws and Section 115-320 of the O.C.L.A., as amended, evidence of driving an automobile at a greater rate of speed than the designated speed for the particular area, is prima facie evidence of violation of the basic rule.

2. Where the speed of a driver is an issue in an action for negligence against such driver and there is substantial evidence that he drove at a speed greater than the designated speed under the Oregon laws, and the issue was raised upon pre-trial as an issue of law, the jury should be instructed as to the designated speed in the area in question, and it should further be instructed that a violation of such designated speed is prima facie evidence of a violation of the basic rule.

3. Since the Court refused to instruct the jury on the issues as above stated a reversible error was committed by the Court and appellant should have a new trial.

REUBEN G. LENSKE,
Attorney for Appellant.

Service is accepted at Portland, Oregon, December 4th, 1943.

JAMES C. DEZENDORF,
Of attorneys for Appellee.

[Endorsed]: Filed Dec. 7, 1943.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

EDWARD SWIDERSKI,

Appellant,

VS.

ALLEN L. MOODENBAUGH,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

FILED

JAN 31 1944

REUBEN G. LENSKE PAUL P. O'BRIEN,
Attorney for Appellant CLERK

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

~~BRIEF OF APPELEE~~
BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION

This is an action for personal injuries suffered by plaintiff as the result of an automobile collision that occurred in Milwaukie, Oregon, on July 22, 1941. Appellant, who was the plaintiff in the court below, was and is a citizen of Illinois, and appellee was and is a citizen of the State of Oregon. The amount

sued for was \$35,977.92. By agreement of the parties and the pre-trial order of the court, in the event appellant recovered a judgment in excess of \$5,000.00, such excess would be remitted by appellant. Verdict was returned for appellee and on July 15, 1942, the District Court of the United States for the District of Oregon entered a judgment for appellee and this is an appeal from that judgment and the verdict upon which it is based.

STATUTORY PROVISIONS

The District Court had jurisdiction of the cause because of the diversity of citizenship of the parties, and the amount in controversy exceeded \$3,000.00. See 28 U.S.C.A. Sec. 41, (1) and (c). The Circuit Court of Appeals has jurisdiction as appellate court. See 28 U.S.C.A. Sec. 225 (a) First.

STATEMENT OF THE CASE

In addition to the foregoing facts the following are pertinent. Appellant charged that appellee was negligent in ten specific respects. (Tr. Page 3) The third specification was that appellee drove his automobile at an excessive rate of speed.

Appellee denied that he was negligent in any particular and charged affirmatively that appellant was negligent in seven particular respects (Tr. Page 6). The fifth specification by appellee was that appellant drove at an excessive rate of speed.

Substantial evidence was adduced by appellant that appellee was driving his automobile in excess of 25 miles per hour and the speed of the respective cars was one of the pertinent issues of fact before the jury. In giving its instructions to the jury the court gave the usual instructions as to the effect if the jury found for or against plaintiff or defendant on any of the issues of negligence or contributory negligence, including the issue of excessive speed.

At the time of the collision the controlling statute on the question of speed was Sec. 115-320 of Oregon Compiled Laws Annotated, see Vol. 8, Annual Pocket Part. This Statute provided that the designated speed at the place of collision was 25 miles per hour.

Appellant had not submitted requested instructions, but an issue of law had been submitted to the court as to the designated speed under Section 115-320 O.C.L.A. The following is the issue as it was set forth in the pre-trial order (see Tr. Page 4).

With respect to the allegations in subdivision 3, paragraph I *supra*, it is agreed by the parties that the designated speed at the place of accident was 25 miles per hour. It is the contention of plaintiff that defendant was driving in excess of 25 miles per hour and that under Section 115-320 O.C.L.A. the fact that defendant was driving in excess of 25 miles per hour, if proved, is *prima facie* evidence of negligence on the part of defendant. It is the position of defendant that he was not violating the basic rule and even if he was driving in excess of 25 miles per hour that would not be *prima facie* evidence of negligence under the doctrine of *Zeek vs. Bicknell*, 159 Ore. 167,

which is to the effect that the statutory designated speeds are not relevant in negligence cases and that it is improper to submit to the jury the designated speed.

Upon the conclusion of the court's instructions, the following occurred (see Tr. Page 8) :

"Mr. Lenske: I except to that portion of the instructions relating to speed and ask the court to instruct that the designated speed at the place of the collision, under the Oregon Statute, is twenty-five miles per hour, and that if either of the parties was driving his automobile at a greater speed than twenty-five miles per hour, such fact is prima facie evidence of negligence on the part of such driver; which, however, is not conclusive and can be overcome by other evidence. That is the only exception I have.

"The Court: Exception is granted."

SPECIFICATION OF ERROR I.

The court erred in holding, in effect, for appellee, on the issue of law appearing as Issue No. II of the Pre-trial Order, and which appears on page 4 of the transcript of record: and in substance the court erred in refusing to instruct the jury that the designated speed at the point of collision was twenty-five miles per hour, and that if the jury found from the evidence that appellee was driving in excess of twenty-five miles per hour, such fact was prima facie evidence of negligence on the part of appellee.

POINT A.

Under Chapter 458 of the 1941 Oregon Session Laws and Section 115-320 of the O.C.L.A., as amended, evidence of driving an automobile at a greater rate of speed than the designated speed for the particular area, is *prima facie* evidence of violation of the basic rule.

POINT B.

Where the speed of a driver is an issue in an action for negligence against such driver and there is substantial evidence that he drove at a speed greater than the designated speed under the Oregon laws, and the issue was raised upon pre-trial as an issue of law, the jury should be instructed as to the designated speed in the area in question, and it should further be instructed that a violation of such designated speed is *prima facie* evidence of a violation of the basic rule.

POINT C.

Since the Court refused to instruct the jury on the issues as above stated, a reversible error was committed by the Court and appellant should have a new trial.

AUTHORITIES

55-1007 Vol. 3, Oregon Code Annotated, 1930
(Chapter 217, Oregon Laws 1927).

Sylvis vs. Hayes, 138 Ore. 138, 6 P. (2d) 1098.

Section 55-2201 Oregon Code Annotated, Vol. 5,
1935 Supplement (Chapter 360, 1931 Oregon
Laws).

Section 115-320 Ore. Compiled Laws Annotated,
Vol. 8, Annual Pocket Part (Chapter 360,
Oregon Laws of 1941).

Zeek vs. Bicknell, 159 Ore. 167, 78 P. (2d) 620.

Blashfield, Vol. 10, pages 407 and 417.

ARGUMENT

Since the three points boil down to an analysis of the statute involved and the question of what instructions should be given under it, we shall combine our argument on them. The general rule will be found stated as follows in

Blashfield, Vol. 10, Sec. 6704

Page 407:

"Upon a proper case being presented by the pleadings and evidence, an instruction on speed or lack of control as constituting negligence on the part of a motorist, may, and as a *general rule, should be given, even though not requested, since the court, in charging on a subject, must charge all the law thereon material and applicable to the case.*"

Page 417:

“Where a criminal statute makes a rate of speed in excess of a certain limit prima facie evidence of negligence it is proper for the court to instruct in a civil action that speed in excess of the limit may constitute negligence.”

Now let us look at the Oregon statutes and cases. *Sylvis vs. Hayes*, supra, was based upon an automobile collision that occurred on May 16, 1928 in Portland. At that time Section 55-1007 of Vol. 3, 1930 Oregon Code (Chapter 217 of 1927 Oregon Laws) was in effect. The court, as appears at the bottom of page 421, instructed the jury that the speed limit at the place where the collision occurred was 15 miles per hour if the view was obstructed and

“you are instructed that the Statutes of this State provide that the operator of an automobile shall not operate the same at a rate of speed in excess of 15 miles per hour”,

The Court also states on Page 426:

“Section 1 of Chapter 217, General Laws of Oregon, 1927, codified as Oregon Code 1930, Sec. 55-1007, limits the rate of speed of the driver of an automobile to fifteen miles per hour”

“Based upon this statute and the testimony of record, the trial court was authorized to give defendants’ requested instruction set out above. See *Goff v. Elde*, 132 Or. 698 (288 P. 212).”

Clearly then under the Statute as it existed at that time and as construed by the Oregon Supreme Court, the jury was entitled to know what the speed limit was at the place of collision.

Thereafter, in 1931, 55-1007 of Vol. 3, 1930 Oregon Code Annotated, was repealed and Chapter 360 of the 1931 Oregon Session Laws, which is the same as Section 55-2201, Vol. 5 of the 1935 Oregon Code Annotated Supplement, was substituted. Under this act the so-called basic rule was invoked and in lieu of maximum speed, the so-called indicated speed was applied. Following are the important excerpts from the 1931 law:

“Basic rule: Application of indicated speeds (a) Basic rule. No person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other conditions then existing.”

“Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance upon (or) entering the highway in compliance with legal requirements and with the duty of drivers and other persons using the highway to exercise due care;”

“Any person convicted of a violation of the above basic rule . . . shall be punished . . .”

“(b) Application of indicated speeds. Any person who drives a vehicle upon a highway at a speed in excess of that indicated as follows . . . shall, upon conviction, be punished . . .”

Following are some of the essential differences appearing in the 1941 act (Vol. 8, Oregon Compiled Laws Annotated, 1941 Pocket Part):

“Sec. 115-320. Basic rule: Punishment: Desig-

nated speeds: Designation of different speed: . .
. . (a) Basic rule”

Sec. (a) is substantially the same as the same section in the 1931 law but in Sec. (b) we find the following:

“Any person who drives a vehicle upon a highway at a speed in excess of that *designated* by this act . . . shall, upon conviction, be punished . . . ; *provided, that any speed in excess of said designated speeds shall be prima facie evidence of a violation of subsection (a) of this section.*”

It will be seen that under Chapter 360 of the 1931 Oregon Session Laws, the maximum speed limit was removed, the basic rule was adopted and the so-called indicated speed replaced the speed limit.

Then came the decision in Zeek vs. Bicknell wherein it was held that under the law as it then existed no instructions of the indicated speed should be given to the jury. The court, in that case, pointed out that Oregon had adopted the Uniform Act Regulating Traffic on the Highways which was submitted to various states by the National Conference of Commissioners on Uniform State Laws. The court pointed out, however, that Oregon failed to incorporate in its law any provision that driving beyond the indicated speeds constitutes negligence, either per se or prima facie.

The court pointed out that other states had adopted such provisions and these included Colorado, Kansas, North Carolina, Delaware, Idaho, Michigan, Nebraska, New Mexico, North Dakota, South Dakota,

Iowa, Minnesota and Utah. It was because of the failure of the Oregon legislature to incorporate such a provision that instruction to the jury of the indicated speed was not proper. Because of the importance of the reasoning that lead to the decision in *Zeek vs. Bicknell*, we quote the following from that decision :

The Uniform Act Regulating Traffic on the Highways (Laws of Oregon for 1931, chapter 360, §§ 55-1901 to 55-2808, inclusive, Oregon Code Supplement 1935) is substantially the same as that submitted to the various states for adoption, by the National Conference of Commissioners on Uniform State Laws, in 1926, and revised by the Conference in 1930. Relative to "indicated speeds" for a particular district or location, it is, aside from the matter of penalties for violation thereof, the same in our traffic act as in the uniform act submitted by the National onference. The statement of the basic rule is also identical. It is noted, however, that the various states, with the exception of Oregon, which have patterned their vehicular traffic acts after the one proposed by the National Conference have departed therefrom in reference to "indicated speeds" by providing in substance that driving in excess of a specified speed constitutes negligence or prima facie evidence of negligence. All the states listed in Vol. 11 of Uniform Laws Annotated (1938) as having adopted the Uniform Act Regulating Traffic on Highways have, with the exception of Oregon, enacted statutory rules concerning speed in certain districts or locations and have made a violation thereof either unlawful or evidence of negligence.

In Arkansas the statutory rule with reference to speed in certain districts or locations is as follows :

“Where no special hazard exists the following speeds shall be lawful but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.” Pope’s Digest, 1937, § 6709 (b).

The same statutory language is used in Colorado (Laws 1935, Art. VI, § 74(b)); Kansas (Laws 1937, ch. 283, § 32(b)); and North Carolina (Public Laws 1937, ch. 407, § 103(b)).

The Delaware statute, Rev. Code 1935, § 5621 (83), provides:

“If the rate of speed of a motor vehicle operated on any highway within the State exceeds *
* * such rate of speed shall be deemed prima facie evidence that the person operating such motor vehicle is operating the same in violation of the provisions of this act.”

The statutes of Idaho (Code 1932, § 48-504); Michigan (Comp. Laws 1929, § 4697(5)); Nebraska (Laws 1931, ch. 110, § 4(b)); New Mexico (Comp. Stats. 1929, § 11-804(b)); North Dakota (Laws 1927, ch. 162, § 4(b)) and South Dakota (Comp. Laws 1929, § 8636 (4(b))), state the rule as follows:

“Subject to the provisions of subdivision (a) [basic rule] of this section and except in those instances where a lower speed is specified in this act, it shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe it shall not be lawful.

* * * * *

“It shall be prima facie unlawful for any person to exceed any of the foregoing speed limitations except as provided * * *.”

Iowa (Laws 1937, ch. 134, § 316) condenses the rule into the following:

“The following shall be the lawful speed except as hereinbefore or hereafter modified and any speed in excess thereof shall be unlawful.”

Minnesota (Laws 1937, ch. 464, § 28(b)) :

“* * * Any speed in excess of the maximum speed * * * as herein provided shall be prima facie evidence that the speed is not reasonable nor prudent and that it is unlawful.”

Utah (Rev. Stat. 1933, § 57-7-16(2)) :

“No person shall drive a vehicle upon a highway at a speed in excess of that indicated below for the particular district or location.”

The legislature of this state did not see fit to follow the decided trend of legislation in other states and provide that any person driving in excess of a specified speed should be deemed guilty of negligence or, at least, that such conduct would be prima facie evidence of negligence.

The 1941 Oregon Legislature took cognizance of the reasoning of the Supreme Court in this case and thereupon added the following to the Basic Rule Statute, which comprises the last portion of subsec. (b) of Section 115-320, Oregon Compiled Laws Annotated, Vol. 8, 1941 Annual Pocket Part, to-wit:

“provided, that any speed in excess of said designated speeds shall be prima facie evidence of a violation of subsection (a) of this Section.”

It is to be noted that when the act was so amended the words “indicated speed” were no longer used and the act says [subsec. (b)] “said designated speeds

are as follows :”

It is respectfully submitted that the plain and clear intent of the Legislature was expressed in 1941 in the light of the reasoning in the Zeek vs. Bicknell decision so that a speed in excess of the designated speed became prima facie evidence of a violation of the basic rule and therefore the jury was entitled to know what the designated speed was where the collision occurred and plaintiff was entitled to have the jury informed that a speed in excess of the designated speed was prima facie evidence of negligence to be considered along with the remainder of the evidence.

REUBEN G. LENSKE,

~~Attorney for Appellee.~~

Attorney for Appellant.



NO. 10620

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Oregon.

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,
Attorneys for Appellee,
800 Pacific Building,
Portland 4, Oregon.

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NO. 10620

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Oregon.

STATEMENT OF THE CASE

No issue is raised as to Appellant's statement of jurisdiction. A more complete statement of the facts and issues is desirable in order to properly present the questions to be determined upon this appeal.

The collision, which gave rise to this action, occurred on July 22, 1941, just before midnight. Both cars involved were traveling upon Lake Road in Milwaukie, which is just south of the City Limits of Portland, Oregon.

This is not an intersection case. Appellant's car was traveling east on Lake Road and Appellee's car was traveling west on Lake Road.

The cars came together on Lake Road between 28th and 29th Streets. Appellant's car had just passed the intersection of 28th Street with Lake Road and Appellee's car had passed the intersection of 29th Street with Lake Road (Tr. p. 2).

In the pleadings (Tr. pp. 3 and 6) and at the trial, each party contended that he was driving upon his own half of the highway and that the other turned over onto the wrong side of the highway, causing the collision. This was, of course, the principal issue in the case since no collision could have occurred if both had kept to their own side of the highway, irrespective of speed, lookout or control.

It is not claimed that this principal issue was not fairly and properly submitted to the jury. By its verdict the jury found that Appellee was on his own side of the road and that Appellant swerved over onto his wrong side causing the collision (Tr. p. 9).

Without challenging the correctness of the jury's finding in this regard, Appellant now contends that even though he filed no written request to have the designated speed at the place of accident given to the jury that the trial court committed reversible error in not instructing on the point.

The issue thus raised presents for determination two questions of practice and procedure and two of substantive law to which we now address ourselves.

THE TRIAL COURT CORRECTLY REFUSED TO INSTRUCT ON THE DESIGNATED SPEED AT THE POINT OF ACCIDENT.

Points and Authorities

A.

Since no written request for an instruction on the designated speed was presented, Appellant cannot complain.

Rule 51, Federal Rules of Civil Procedure.

Dallas Ry. & Terminal Co. v. Sullivan (C.C.A. 5th), 108 F. (2d) 581, 584.

Puget Sound Power & L. Co. v. Public Utility Dist. No. 1 (C.C.A. 9th), 123 F. (2d) 286, 291, cert. den. 315 U. S. 814, 62 S. Ct. 798, 86 L. ed. 1212.

Franz Corporation v. Fifer (C.C.A. 9th), 295 Fed. 106, 108.

B.

An oral request made after the charge was given to instruct on the designated speed presents nothing for review.

Indemnity Ins. Co. of North America v. Moses (C.C.A. 5th), 36 F. (2d) 219.

Jasper County Lumber Co. v. McNeill (C.C.A. 5th), 76 F. (2d) 207, 209; cert. den. 295 U. S. 764, 55 S. Ct. 923, 79 L. ed. 1705.

Gilmore v. United States (C.C.A. 5th), 39 F. (2d) 897.

C.

An exception to the failure of the court to instruct upon the designated speed is not the equivalent of a proper written request followed by an adequate exception.

Ripper v. United States (C.C.A. 8th), 179 Fed. 497, cert. den. 218 U. S. 680, 31 S. Ct. 228, 54 L. ed. 1207.

D.

The Oregon Supreme Court has held that it is improper to instruct on the designated speed.

Zeek v. Bicknell, 159 Ore. 167, 78 P. (2d) 620.

Ross v. Robinson, 169 Ore. 293, 124 P. (2d) 918, 128 P. (2d) 956.

E.

Since the cars were traveling toward each other on a straight highway and the jury found that Appellee was

on his own side of the road and Appellant turned into Appellee's car, his alleged violation of the indicated speed could not be the proximate cause of the accident, in any event.

Arundel v. Turk, 16 Cal. App. (2d) 293, 60 P. (2d) 486.

Erdman v. Inman, 165 Ore. 590, 109 P. (2d) 593.

Argument

At the trial, Appellant did not submit any requested instructions (Tr. p. 8). Yet he is here complaining that the Court committed reversible error in omitting to call the jury's attention to the designated speed at the location of the accident. The court did instruct on the basic rule and expressly told the jury that if either party violated the basic rule that he would be guilty of negligence (Tr. p. 8).

Rule 51 F.R.C.P. provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * *"

Reference to the authorities will demonstrate that since no written requests were submitted that appellant may not now be heard to complain.

In *Dallas Ry. & Terminal Co. v. Sullivan*, 108 F. (2d)

581, plaintiff sued for damages for personal injuries and the jury returned a verdict in his favor. Defendant appealed, contending that the trial court erred in failing to define to the jury "new and independent cause." In affirming the judgment, the Circuit Court of Appeals for the Fifth Circuit said on Page 584:

"Under Federal Rules, of practice and procedure, appellant's assignments, one and two, must be overruled. First, because one complaining of the refusal to give a charge must be prepared to show that he requested it in writing, *Indemnity Insurance Co. of North America Co. v. Moses*, 5 Cir., 36 F. 2d 219; Rule 51, Rules of Civil Procedure, and, appellant did not do this."

This Court recently ruled upon the question in *Puget Sound Power & Light Co. et al. v. Public Utility Dist. No. 1*, 123 F. (2d) 286, wherein the late Judge Haney said on Page 291:

"While it might have been proper for the trial court to give a cautionary instruction, the company requested none, and it cannot now urge error in that respect."

The same rule was announced by this Court in the earlier case of *Franz Corporation v. Fifer*, 295 Fed. 106, 108.

At the conclusion of the Court's charge to the jury, the following occurred (Tr. p. 8) :

“ ‘Mr. Lenske: I except to that portion of the instructions relating to speed and ask the court to instruct that the designated speed at the place of the collision, under the Oregon Statute, is twenty-five miles per hour, and that if either of the parties was driving his automobile at a greater speed than twenty-five miles per hour, such fact is prima facie evidence of negligence on the part of such driver; which, however, is not conclusive and can be overcome by other evidence. That is the only exception I have. ’ ”

“ ‘The Court: Exception is granted.’ ”

Whether counsel's statement be considered as an exception or as an oral request to instruct, it is clear, under the authorities, that Appellant may not now contend that the trial court committed reversible error in not instructing on the point.

In *Ripper v. United States*, 179 Fed. 497, cert. den. 218 U. S. 680, 31 S. Ct. 228, 54 L. ed. 1207, defendant was convicted for violating the Oleomargarine Act. In denying a petition for rehearing, the Circuit Court of Appeals for the Eighth Circuit said at Pages 497 and 498:

“Complaint is now made that the trial court refused to instruct the jury that in order to convict it was necessary they should find the neglect to destroy the stamps was willful, and that this matter was assigned as error, but was not considered in our former opinion. It is said in the petition for rehearing that counsel

for the accused requested such an instruction, and it was refused. The record does not disclose that any requests whatever were made of the trial court. At the conclusion of the charge counsel merely excepted to it upon a number of grounds, among which was one that the court failed to instruct that the neglect to cancel the stamps must have been willful. This exception is the sole basis for the statement that a request was made and refused. It is the settled rule that if a party desires an instruction upon the law he must ask for it. *Texas & Pacific Railway v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; *Isaacs v. United States*, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; *Goldsby v. United States*, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343; *Backus v. Depot Co.*, 169 U. S. 557, 575, 18 Sup. Ct. 445, 42 L. Ed. 853; *Humes v. United States*, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011. A bare exception to a charge is not equivalent to a request."

In *Indemnity Ins. Co. of North America v. Moses*, 36 F. (2d) 219, the Circuit Court of Appeals for the Fifth Circuit said at Page 220:

"If appellant, as it insists, also requested orally charges on the subject of partial or temporary disability, it still presents nothing here for review. An oral request merely to charge on an issue in a case is not sufficient basis for an assignment of error in a federal appellate court; but, in order to save a valid exception, it is essential to submit a request to charge in definite form. *Southern Ry. Co. v. Shaw* (C.C.A.) 86 F. 865, 871; *Tennessee, etc., R. R. Co. v. Drake* (C.C.A.) 276 F. 393."

In *Jasper County Lumber Co. v. McNeill*, 76 F. (2d) 207, the Circuit Court of Appeals for the Fifth Circuit said at Page 209:

“Besides a party who makes no objection to a charge as given except that it is incomplete is ordinarily in no position to assign error upon it. In fairness to the trial court, a request for a supplemental charge should be prepared and submitted in writing in advance of the court’s charge to the jury, or at least in time for the judge to consider it and decide whether he will give it. The court should not arbitrarily refuse to give instructions at the conclusion of its charge which it was his plain duty in the interest of justice to give without being requested to do so; but ordinarily an oral request merely to charge generally upon some issue in the case or some question of law presents nothing to an appellate federal court for review. *Holmgren v. United States*, 217 U. S. 509, 524, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; *Western & Atlantic R. R. v. Hughes*, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473; *Tennessee, etc., R. R. Co. v. Drake* (C.C.A.) 276 F. 393; *Indemnity Insurance Co. v. Moses* (C.C.A.) 36 F. (2d) 219; *Gilmore v. United States* (C.C.A.) 39 F. (2d) 897.”

In *Gilmore v. United States*, 39 F. (2d) 897, in affirming a judgment of conviction, the Circuit Court of Appeals for the Fifth Circuit said at Page 898:

“The trial court in its charge to the jury did not comment upon the law of circumstantial evidence. At the conclusion of that charge, for the first time the court was orally requested by counsel, but refused, ‘to charge the jury the law of circumstantial evidence.’ Error is assigned upon the refusal of that request; but we do not think it is well assigned. In the first place, the request came too late. It is the duty of counsel in fairness to the court to submit requests for instructions to the jury before the court begins its charge; but the court should not arbitrarily refuse, especially in criminal cases, to give instructions re-

requested at the conclusion of its charge which it was its plain duty in the interests of justice to give without being requested to do so.

“Besides, the orderly way is to prefer such a request in writing so that the trial court may know definitely what it is, and the appellate court may be able to inspect it with the view of ascertaining whether in its opinion the proposition of law asserted is correct and is applicable to the facts of the case.

“The refusal of a mere oral request to charge generally upon some question of law presents nothing to an appellate court for review. *Holmgren v. United States*, 217 U. S. 509, 524, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; *Greenburg v. United States* (C.C.A.) 297 F. 45; 14 R.C.L. 804.”

It is clear therefore that Appellant may not now contend that the trial court committed reversible error in not instructing upon the designated speed.

Assuming that Appellant properly requested an instruction on the designated speed, so that he is now entitled to contend that the trial court erred in omitting to instruct on the point (which we emphatically deny), two rules of substantive law support the trial court's action in refusing to instruct on the point.

The question whether it is proper to call the jury's attention to the designated speeds has been considered twice by the Oregon Supreme Court. In both cases it was held that the trial judge erred in mentioning the designated speed to the jury.

In *Zeek v. Bicknell*, 159 Ore. 167, 78 P. (2d) 620, the trial judge instructed the jury upon the basic rule and called their attention to the designated or indicated speed at the place where the collision occurred. The jury returned a verdict for the plaintiff and the trial judge set it aside and granted a new trial. Plaintiff thereupon appealed and the Oregon Supreme Court held that a new trial was properly ordered because the trial court erred in instructing on the indicated speed. The Oregon Supreme Court said on Page 174 (of 159 Ore.):

"The court is not unmindful that, in *Dickson v. King*, supra, (147 Ore. 638, 34 P. (2d) 664) an order granting a new trial was sustained because the trial court failed to instruct the jury concerning indicated speed. In that decision we did not state that it was necessary that trial judges should give to juries in civil actions the indicated speeds. The decision left the matter optional, dependent upon whether the trial judge believed that he could make the meaning of the basic rule clear by reference to the indicated speeds. It assumed that the legislature thought that a 'reasonable and prudent' speed was somewhat abstract and, hence, the indicated speeds were added by way of illustration to make the basic requirements clearer in the instances to which they were applicable. *But, since in actual practice misunderstanding and confusion have arisen, we believe*

that it is better to omit from instructions in negligence actions all mention of the indicated speeds. Accordingly, instructions ought to define the meaning of the basic rule and omit mention of the indicated speeds."

The recent case of *Ross v. Robinson*, 169 Ore. 293, 124 P. (2d) 418, 128 P. (2d) 956, follows *Zeek v. Bicknell*. In speaking of the trial court's instruction on the indicated speed, the Oregon Supreme Court said on Page 313 (of 169 Ore.):

"He should not have brought into the case any mention of indicated speed."

It is true, as counsel for Appellee suggests, that the Legislature in 1941 amended the speed law so as to include a provision making any speed in excess of the designated speeds *prima facie* evidence of a violation of the basic rule.

However, the reason which impelled the Oregon Supreme Court in the *Zeek Case* to rule that the indicated or designated speeds should not be mentioned to the jury is still applicable.

In any event, since the trial court instructed that a violation of the basic rule by either party would constitute negligence, it cannot be seriously argued that had the designated speed been mentioned that a different result would have been reached by the jury. Obviously, therefore, the failure of the court to mention the designated speed cannot be said to have been prejudicial or reversible error.

The application of ordinary common sense to the situation discloses that Appellee's speed could have had no proximate relation to the collision, in any event.

Appellee contended, the evidence proved and the jury found that Appellant turned from his own side of the highway over onto Appellee's half of the road and into Appellee's car. Had Appellee's car been standing still, the same result would have followed. In these circumstances, it is clear that Appellee's speed, whether over or under the designated speed, was not the proximate cause of the collision and the trial court was correct in not advising the jury of the designated speed.

The identical situation was before the California District Court of Appeals in the case of *Arundel v. Turk*, 16 Cal. App. (2d) 293, 60 P. (2d) 486. In that case the plaintiff was driving south on Main Street in Ocean Park. Defendant was driving north on the same street. A collision occurred and each party charged that the other turned from his half of the highway into the other's car. A trial was had before a jury and a verdict was returned for the defendant. Plaintiff appealed contending that the trial court erred in not giving her instruction to the effect that if defendant was operating his automobile at a greater speed than permitted by the basic rule, that she would be entitled to recover. The Appellate Court affirmed the judgment on the verdict for defendant saying on Page 488 (of 60 P. (2d)) :

“It is earnestly urged that, in view of the crowded condition of the traffic and the width of the street, coupled with the fact that the accident occurred in the nighttime, it was incumbent upon the court to instruct the jury as requested. We find no merit in this claim of appellant. * * * In this case, the only pertinent issue was: Upon which side of the street did the accident happen? The rejected instruction could serve only to confuse the jury and to divert their minds from a consideration of the actual cause of the accident, which the record clearly discloses was caused by one or the other of the parties turning from the proper to the wrong side of the street. *As we view the evidence, no construction thereof will admit of a conclusion that the speed of either automobile proximately or even remotely caused the accident. The proffered instruction was therefore properly refused.*”

A very similar case was recently decided by the Oregon Supreme Court. It is the case of *Erdman v. Inman*, 165 Ore. 590, 109 P. (2d) 593. In that case plaintiff was driving north on a straight highway at one o'clock in the morning. Defendant was going in the opposite direction and a collision occurred. The Oregon Supreme Court stated the contentions of the parties as follows on Page 591 (of 165 Ore.):

“Each party claims that the other was driving on the wrong side of the highway at an excessive rate of speed, without having his car under control. The vital issue was whether the plaintiff or the defendant was on the wrong side of the road, although evidence of speed was received without objection by either party.”

The trial judge gave the following instruction:

“‘If you should find, for instance, that he (defendant) was going too fast at that time, was that speed the proximate cause of the collision in and of itself. Of course, if it was not, why plaintiff could not recover on that ground, you see.’”

A verdict was returned for the plaintiff and the defendant appealed contending that the court erred in giving the instruction above quoted because the defendant's speed could not have been the proximate cause of the collision. The court said:

“Obviously, if defendant had been driving on his right side of the highway, there could have been no collision unless plaintiff drove over onto his wrong side. *Under such circumstances, the speed at which the defendant was traveling was immaterial and could not possibly have been the proximate cause of the accident.*

* * * * *

“The instruction in the instant case might well have been omitted but we fail to see where it misled or confused the jury. Had counsel been as specific in the lower court as here, no doubt the trial judge would have removed all doubt concerning the instruction.

“Finding no error substantially effecting the rights of the appellant, it follows that the judgment is affirmed.”

The doctrine of last clear chance is not involved. Appellant did not take the position that his car was on the wrong side of the road long enough for Appellee to have seen it and, having seen it, that Appellant thereafter failed to take the necessary action to avoid colliding with him.

CONCLUSION

Appellant's failure to file a proper written request for an instruction on the designated speed, as required by Rule 51, F.R.C.P., precludes him from asserting that the trial court erred in failing to so instruct.

An oral request, made after the charge was completed, for an instruction on the designated speed or an exception to the failure of the court to instruct on the designated speed, does not take the place of a proper written request, followed by an adequate exception.

In any event, since Appellant and Appellee were approaching each other on a straight road and it was contended, proved and the jury found that Appellant turned from his side of the road over onto Appellee's side and against Appellee's car, the proximate cause of the accident could not have been Appellee's speed.

Even if it be assumed that a proper request were made, the Oregon Supreme Court has held that the designated or indicated speeds should not be disclosed to the jury.

It cannot be successfully contended that the result would have been different had the designated speed been given to the jury.

Actually, the instructions of the Court were more favorable to Appellant than he deserved. The trial court instructed the jury that if either driver violated the basic rule that he would be guilty of negligence. Under the law and the facts, Appellee's speed could not have been the proximate cause of the accident.

We respectfully submit that the judgment of the trial court, entered on the verdict of the jury, must be affirmed.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,
Attorneys for Appellee,
800 Pacific Building,
Portland 4, Oregon.

No. 10,620

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States, for the District of Oregon.

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,
Attorneys for Appellee,
800 Pacific Building,
Portland 4, Oregon.

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No. 10,620

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States, for the District of Oregon.

TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT:

Comes now Appellee and petitions the court for a
rehearing herein on the following ground:

The majority opinion, insofar as it holds that the trial
court erred in not instructing the jury upon the design-
ated speed at the place of accident, places a construc-

tion upon the Oregon Statute as amended in 1941, which is directly opposed to that adopted by the Oregon courts, as appears from the Affidavit of the Honorable James W. Crawford, Acting Presiding Judge of the Circuit Court of the State of Oregon, for the County of Multnomah, which is attached hereto and made a part hereof.

While it is true that the Oregon Supreme Court has not passed upon the question since the amendment of the Statute in 1941, the very fact that the circuit courts' construction of the Statute, as amended, has not been challenged on appeal, although literally thousands of accident cases have been tried since the Statute was amended in 1941, strengthens the circuit courts' construction of the Statute as amended.

The construction placed upon the amended Statute by the Oregon courts was called to this court's attention at the oral argument, yet it has been entirely disregarded in the majority opinion, although this court is entitled to take judicial notice of the Oregon courts' construction of the Statute as amended.¹

The Oregon courts' construction of the Statute, as amended, was a matter of general knowledge among attorneys and judges in Oregon at the time this case was tried below and was known to and followed by the trial judge in instructing the jury in this case.

¹ See *Lowman v. Billington*, 119 N. Y. Supp. 825, 65 Misc. 111; *Flannigan v. Security-First National Bank*, 41 F. Supp. 77.

This court should not disregard and overrule the construction placed upon the Oregon Statute, as amended, by the Oregon courts.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,

JAMES C. DEZENDORF,

Attorneys for Appellee.

I, JAMES C. DEZENDORF, one of counsel for Appellee, hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES C. DEZENDORF.

No. 10620

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

AFFIDAVIT OF JAMES W. CRAWFORD

Upon Appeal from the District Court of the United
States, for the District of Oregon.

STATE OF OREGON }
County of Multnomah }ss.

I, JAMES W. CRAWFORD, being first duly sworn, depose and say:

That I am a duly elected and acting judge of the Circuit Court of the State of Oregon for the County of Multnomah, Fourth Judicial District, Department No. 2; that there are seven departments of the Circuit Court of the State of Oregon, for the County of Multnomah,

each presided over by a Circuit Judge, and each department has tried automobile accident cases since Section 115-320, O.C.L.A., was amended by Chapter 458 of Oregon Laws, 1941; that following the amendment of the statute the judges of the departments informally discussed the question as to whether juries hearing automobile accident cases should be instructed upon designated speeds at the places where the various accidents occurred, in view of the 1941 amendment, and it was the consensus of opinion and has been the general practice since, that such instructions should not be given. It has been the general opinion that the law as laid down by the Oregon Supreme Court in the case of Zeek vs. Bicknell, 159 Ore. 167 was not changed in this respect by the 1941 amendment. The general practice in this respect in this jurisdiction has been a matter of general knowledge among attorneys and judges and to my knowledge has been followed consistently and still is the practice in the Circuit Court of the State of Oregon, County of Multnomah.

JAMES W. CRAWFORD.

Subscribed and sworn to before me this 23rd day of June, 1944.

GEO. D. GARRATT,

(SEAL)

Notary Public for Oregon.

My commission expires July 21, 1944.

